Justice of the Peace

VOLUME CLIII 1989

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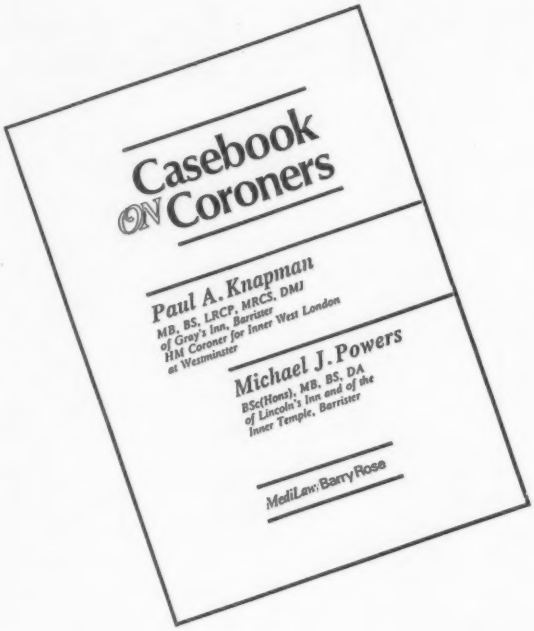

Casebook ON Coroners

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This book consists of 27 judgments given in the Divisional Court, arising from inquest verdicts during the period 1983 to 1989, which the editors have thought appropriate to include. Each case is followed by a Commentary, and the Coroners Act 1988, is included in facsimile. The volume will make an excellent up-date of Thurston's *Coronership: The Law and Practice of Coroners* (1985), 3rd edition, of which the learned editors of this volume were the authors.

Perhaps it should be said that Michael Powers is the learned specialist editor of *Justice of the Peace Reports,* responsible for Coroners Law in that series, and most of the cases in the volume have already appeared in the Reports - although of course without the Commentary which the Publishers are confident will be found of much assistance to Coroners, Practitioners and others whose work takes them into Coroners' Courts.

It is hoped that this book will be the first of an annual series.

289pp. + xiii + 27pp. Coroners Act 1988. Hardback £32. Paperback £27, post free.

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ANALYTICAL INDEX TO CASES

ADVERTISEMENTS

Advertisement of medicinal product - claim that anti-arthritic drug has special effect - less severe side effect on gastric system - claim not substantiated by clinical or other appropriate trials or studies - whether advertisement misleading - s. 93 Medicine Acts 1968.

The first defendants were convicted on four counts of issuing a false or misleading advertisement concerning a medicinal product. The second defendant was similarly convicted on four counts of consenting and conniving at the issue of such advertisement. The product in question was known as Surgam and was intended for the relief of pain and inflammation resulting from arthritis. One of the side effects of some anti-inflammatory drugs is gastric irritation. The defendants claimed that Surgam operated in a special way in that it was suggested that it did not have such a side effect as compared with another drug called Indomethacin. When Surgam was launched in 1982 the claim was challenged by an expert, who was asked to carry out some further research by the first defendants. In March 1983 the expert confirmed his initial view and he reported this at a meeting on March 25, 1983. Advertisements had already been drawn up and arrangements made for these to appear in the *British Medical Journal* on several occasions starting on March 26. It was not possible by the meeting to cancel the first advertisement. The convictions related to counts concerning later advertisements. The charges were brought under s. 93 of the Medicines Act 1968. The relevant provisions are as follows:

Section 93(1):

"... any person who, being a commercially interested party, or at the request or with the consent of a commercially interested party, issues, or causes another person to issue, a false or misleading advertisement relating to medicinal products of any description shall be guilty of an offence."

Section 93(7):

"For the purposes of this section an advertisement (whether it contains an accurate statement of the composition of medicinal products of the description in question or not) shall be taken to be false or misleading if (but only if) - (a) it falsely describes the description of medicinal products to which it relates, or (b) it is likely to mislead as to the nature or quality of medicinal products of that description or as to their uses or effects, and any reference in this section to a false or misleading representation shall be construed in a corresponding way."

Section 130(1):

"For the purposes of this Act a document, advertisement or representation shall be taken to be likely to mislead as to the uses or effects of medicinal products of a particular description if it is likely to mislead as to any of the following matters, that is to say ... (c) any effects which such products when used in any particular way referred to in the document, advertisement or representation, produce or are intended to produce."

Held: (1) There was no reason to place upon the word "quality" the restricted meaning applied in the context of s. 2 of the Food and Drugs Act 1955 (now the Food Act 1984). Section 93 of the 1968 Act is directed at false or misleading advertisements by a commercially interested party and has nothing to do with any reference to the sale of the product advertised.

(2) The issue of the meaning of the word "effect" in s. 93(7) was properly placed before the jury and it would have been wrong for the trial Judge to have directed the jury that they must treat the special operation of Surgam as a "cause" as opposed to an "effect", as contended for

by the defence.

(3) Whilst it is important that the prosecution case must be precisely stated, in this instance it was not open to the defence to argue that there was not sufficient particularity in the counts against the defendants. No particulars were sought by the defendants and it would seem that in any event the prosecution could have put its case under all four heads, namely, "quality", "nature", "use" and "effect". The appeals would be dismissed.

Per curiam: In future prosecutions under this section it is desirable in the interests of all concerned that the particulars of the offence should contain the word or words relied upon under s. 93(7).

ANIMALS

Whether procuring the fighting of a dog with a badger is an offence under s. 1(1)(c) of the Protection of Animals Act 1911.

The defendant was convicted at the magistrates' court on two informations under s. 1(1)(c) of the Protection of Animals Act 1911, each alleging that he procured the fighting of a dog - in the first charge a terrier bitch and in the second a terrier dog. The facts of the case were that the defendant was seen by police officers digging into one of the entrances to a badger sett from which the two dogs emerged suffering from recent injuries. The terrier dog had wounds which in the opinion of a veterinary surgeon were caused by a strong jawed animal such as a badger. On appeal against conviction the Crown Court was of opinion that there was *prima facie* evidence that both dogs were fighting with a badger, but as a badger was not a domestic or captive animal within the definition of "animal" in s. 15 of the Act, there was no case to answer under s. 1(1)(c) and dismissed the charges.

On appeal by the prosecution by way of case stated:

Held (dismissing the appeal): In relation to an offence of procuring the fighting of an animal contrary to s. 1(1)(c) of the Protection of Animals Act 1911, that section required that both the animal which was the subject of the charge and the animal with which it was fighting came within the definition of "animal" in s. 15 of the Act, namely, "any domestic or captive animal".

Appeal: by the prosecution by way of case stated against a decision of Gloucester Crown Court allowing an appeal by Trevor Noel Barry against his conviction by Coleford magistrates' court of two offences under s. 1(1)(c) of the Protection of Animals Act 1911.

BYELAWS

Validity - whether a defendant may be convicted of an offence under a byelaw which is ultra vires as to part - s. 14(1), Military Lands Act 1892.

The Secretary of State for Defence made various byelaws under s. 14(1) of the Military Lands Act 1892. This byelaw-making power was expressly subject to a proviso protecting rights of common against the byelaws made under it. Where, contrary to the proviso, byelaws were made which prejudicially affected rights of common, the question arose as to whether a defendant who was not exercising rights of common could be properly convicted of an offence

under the byelaws.

(In the case of Hayman, which was an application for a declaration and where there was no immediate issue of criminal liability, the issue arose out of the display of a notice which appeared to restrict the exercise of a right of way, but in the light of certain statements made on behalf of the Secretary of State for Defence, this application was not pursued).

Held: (1) As a general principle, where the court is modifying a decision which has been made by some other person under statutory powers given to that other person and not to the court - (a) the court can only cut down the ambit of the decision so as to reflect the limitations of the empowering statute, and cannot make the decision cover cases which, although within the ambit of the empowering statute, were not in fact covered by the decision in question; and (b) this function is not limited to cases where certain words can be excised from the initial decision in such a way that the remaining words, on their own, make sense and are within the ambit of the empowering statute; but (c) the court should perform this function only where it is sure that the altered decision represents that which the decision-maker would have enacted if he had appreciated the limitation on his powers, and, if the court has any doubt on this aspect of the matter, the proper course is to quash the decision as a whole and leave the decision-maker to decide afresh.

(2) On the facts of the present cases, convictions were properly recorded by the magistrates.

Applications for judicial review and appeal by way of case stated.

CARAVANS

Caravan site licences - whether visual amenity is a relevant consideration - s. 5, Caravan Sites and Control of Development Act 1960.

The appellant held a licence under the Caravan Sites and Control of Development Act 1960, subject to a condition requiring the removal of the caravans from the site during a specified period each winter. He applied to the respondent local authority for the removal of that condition. His application failed and he then appealed to the magistrates' court. In dismissing his appeal, the magistrates had regard to the visual amenity of the area.

On appeal to the Queen's Bench Division of the High Court by way of case stated.

Held (dismissing the appeal): On a proper construction of s. 5 of the 1960 Act, the visual amenity of the area was a matter to which the magistrates could lawfully have regard.

Appeal by way of case stated against a decision of the Norfolk justices sitting as a magistrates' court at Cromer.

CHILDREN AND YOUNG PERSONS

Indecent photograph of child - whether circumstances and motivation of photographer relevant on issue of indecency - Protection of Children Act 1978, s. 1(1)(a).

The appellant was convicted on indictment of taking an indecent photograph of a boy aged 7 years, contrary to s. 1(1)(a) of the Protection of Children Act 1978. The boy and his parents who were naturists were at a swimming baths one evening where nude bathing was taking place. The use of the baths was confined to naturists and the general public were not admitted. The appellant's offer to teach the boy to swim was accepted by his mother and he remained with the boy. Later, with the consent of the boy's parents, the appellant arranged for a photograph of himself and the boy to be taken by an official photographer. Without the parents' knowledge, however, the appellant also took two photographs of the boy in private in a separate room and when the parents became aware of that they informed the police.

When interviewed by the police the appellant admitted that he found the boy attractive and that he obtained sexual gratification by taking or looking at such photographs. At the trial the Judge ruled that the circumstances in which the photographs were taken and the motivation of the appellant when he took them, were relevant in deciding whether the photographs were indecent or not.

Held: On the issue of whether or not a photograph was indecent within the meaning of s. 1(1)(a) of the Protection of Children Act 1978, the proper test was for the jury to decide, by looking at the photograph, whether or not it was indecent by applying the recognized standards of propriety to it.

The surrounding circumstances and the motivation of the photographer were not relevant to that issue, though, in appropriate cases, they might be relevant in deciding whether the taking of the photograph was intentional or accidental. In the instant case it was accepted that the appellant had intentionally taken the photographs of the boy. The appeal would be allowed.

Appeal: by John Graham-Kerr against his conviction at Portsmouth Crown Court of taking an indecent photograph of a child.

R. v. Graham-Kerr C.A. (Crim. Div.) 171

Juvenile - confession - interview at police station - father present against juvenile's wishes - whether estranged father an "appropriate adult" - whether confession admissible.

The defendant was a girl of 16. She had run away from her father and step-mother and did not wish to have any further contact with them. She was living voluntarily in a hostel and was not under any compulsory state supervision. There was a fire at the hostel and the defendant was arrested at 10.30 a.m. on suspicion of arson. She was taken to a police station, arriving there at 10.50 a.m. Some 10 to 15 minutes later a female police officer searched her and that was the only contact she had with a female officer. She indicated that she did not wish to see a solicitor. She was adamant that she did not want her father contacted and refused to give his address. She said she wished her social worker to attend the interview which was to take place. The social worker was contacted but refused to attend. At 12.10 p.m. the emergency duty social worker was contacted but refused to attend. The social workers said that, as a matter of policy, they would not attend such interviews at a police station unless the parents could not be found or refused to attend. A police officer advised the defendant that it was in her own interests to give her father's address and that the longer she refused to do so the longer she would be kept in custody. At 12.50 p.m. she gave the police her father's address. He arrived at the police station at about 1.15 p.m. but the defendant ignored him. An interview, which was tape recorded, took place at 2.10 p.m. The defendant made a full confession of the offence of arson. She was subsequently charged and released at 2.44 p.m. When the matter came before the magistrates for trial it was submitted that the defendant's statement was inadmissible under s. 76(2) of the Police and Criminal Evidence Act 1984 which provides:

"If ... it is represented to the court that the confession was or may have been obtained ... in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by [the accused person] in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

The Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, Code C, contains provisions relating to juveniles:

"C1.7 In this code 'the appropriate adult' means in the case of a juvenile:

(i) his parent or guardian (or, if he is in care, the care authority or organization);
(ii) a social worker; or
(iii) failing either of the above, another responsible adult who is not a police officer or employed by the police.

C13.1 A juvenile must not be interviewed ... in the absence of the appropriate adult [except for urgent interviews under Annex C].

Note: 13C The appropriate adult should be informed that he is not expected to act simply as an observer. The purposes of his presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly; and, secondly, to facilitate communication with the person being interviewed."

The magistrates held that the confession was inadmissible for the following reasons:

"(a) the [defendant's] estranged father was not an 'appropriate adult' in the circumstances, and therefore the [defendant] had not communicated with, or been advised by, an independent person prior to the interview, which would have been desirable given her age;
(b) all visits to the [defendant] should have been recorded on the custody sheet;
(c) after being searched by a female police officer, the [defendant] should not have been left entirely in the charge of male police officers for the whole of the period leading up to the taped interview;
(d) the [defendant] should have been offered refreshment during her period in custody."

The Director of Public Prosecutions appealed by way of case stated.

Held - dismissing the appeal: The general test which governed the whole approach of the court was to be found in s. 76(2) of the Police and Criminal Evidence Act 1984. In considering whether the prosecution had discharged the burden of proof specified in that provision, the provisions of Code of Practice C were simply matters to be taken into account. Although they were important matters they were not necessarily conclusive either way, and they were not the only matters to be taken into account. Note 13C to para. C13 of the Code referred to the "appropriate adult" being of assistance and being a safeguard to the juvenile. In this case, the magistrates were entitled to find that the estranged parent, whom the child did not wish to attend her interview, did not come within the spirit of the Code of Practice so as to fulfil the objectives of ensuring a fair interview. Therefore, the confession was not made when there was an appropriate adult to assist as described in Note 13C to para. C13. Although this was not how the magistrates had couched their opinion in para. (a) of their reasons, it was the effect of it. On the basis of that reason the magistrates were entitled to find that the confession was inadmissible. The magistrates' other opinions stated in paras. (b), (c) and (d) would not have justified such a finding.

Per curiam: It was to be hoped that social workers would take note of the problem which had arisen in this case, and would relax whatever policy they had so as to ensure that an appropriate adult, in the form of one of their representatives would attend as promptly as

CONSUMER CREDIT

Credit advertisement - whether false or misleading - annual percentage rate described as zero - more allowed by way of part-exchange for cash purchaser than for purchaser on credit - ss. 44 and 46 Consumer Credit Act 1974 - Consumer Credit (Advertisements) Regulations 1980.

The respondent company inserted an advertisement in a newspaper relating to a "splendid 0% deal on the Renault 21". It was stated that this offer was subject to credit status and applied to certain vehicles (including the Renault 21) ordered and registered between certain dates. In the middle of the advertisement in large characters was "0% APR". A trading standards officer visited the premises of the respondent company and asked for the on the road price of a Renault 21 TL. The cost was calculated at £7758.75. He was asked if it was a part-exchange transaction. The officer asked the salesman to inspect his vehicle which he did. The salesman referred to the 0% finance deal and indicated that the part-exchange figure would be in the region of £3250 if that option was chosen. When asked how much allowance would be made if the purchaser was to pay cash, the salesman indicated that it would be in the region of £3500-£3600. The appellant argued that the advertisement suggested that a credit purchaser would pay no more overall than a cash purchaser, but that in reality because of the reduced allowance, would do so to the extent of some £300-£400. This was a misleading credit advertisement contrary to the Regulations and s. 46(1) of the Consumer Credit Act 1974. The justices dismissed both informations on the basis that the purchaser was paying the same price for the vehicle whether it was a cash or credit transaction and that the part-exchange transaction was a separate matter. It was stated by the justices that the difference in the part-exchange allowances merely reflected the greater risk to the respondents attaching to part-exchange when the balance wa paid on credit terms. On appeal:

Held: The legislation does not prohibit vendors and purchasers from negotiating such terms as they choose, but what it does is to prevent prospective customers from being misled into thinking that superficially attractive credit terms would not involve them in any greater outlay than if the transaction was for cash, when this is not the case. A *prima facie* case was made out in the circumstances such as this, where a greater allowance on a part-exchange transaction is given to a cash purchaser as opposed to a credit purchaser. There was in reality one transaction only for these purposes and there was no substance in the argument accepted by the justices. The case would be remitted to the justices to continue the hearing.

Credit agreement - rebate for early settlement - statutory and contractual rebate tables - whether booklet containing contractual tables false - whether offence under s. 46 Consumer Credit Act 1974 - request for information showing amount to discharge debtor's indebtedness under agreement - whether information supplied an offence under s. 97 Consumer Credit Act 1974 and reg. 2 and para. 4(1) of the schedule to Consumer Credit (Settlement Information) Regulations 1983.

A Mr. Mossess entered into an agreement with the appellants for the supply of double glazing units. In order to finance the transaction he entered into a credit agreement with a

company related to the appellants. At the time of entering into the agreement he was supplied with a booklet giving details, *inter alia,* of rebate tables. After installation of the units and paying the first instalment Mr. Mossess decided to pay off the loan in a lump sum. The rebate tables enacted any rebate to be calculated and contained a note printed in red as follows: "The implementation of the final stages of the Consumer Credit Act 1974 may result in slight variations in the amounts of rebate compared with those shown in these tables".

On April 24, 1986 Mr. Mossess telephoned the finance company for details of the amount to settle early. The company replied by letter of April 28, showing an amount of rebate calculated in accordance with the statutory tables in the Regulations made under the 1974 Act. This amounted to £68.42 less than a calculation based on the tables in the booklet given to Mr. Mossess. On advice from the local trading standards department he wrote on May 11, asking for the information he had already received. He received a letter from the finance company which was identical to that sent on April 25. The appellants were charged with two offences, one under s. 46 of the 1974 Act, namely, conveying information by means of an advertisement which is false or misleading in a material respect. The second was brought under s. 97 and reg. 2 and para. 4(1) of the schedule to the Consumer Credit (Settlement Information) Regulations 1983, whereby the debtor is entitled to a rebate either on the statutory rate (s. 95 and Regulations) or the contractual rate whichever is the higher. The justices convicted the appellants on both charges. On appeal:

Held: (1) On the basis that the rebate tables in the booklet had been incorporated into the contract, there was sufficient evidence to show that the advertisement was misleading within s. 46 of the Act. The justices were entitled to hold by virtue of s. 46(2) that it was always the intention of the appellants to allow a rebate in accordance with the statutory formula, rather than the higher amount specified in the contract. With regard to the disclaimer, the justices were not acting perversely in holding that a 5 per cent difference between the amounts payable under the two methods of calculation was not a slight variation.

(2) In relation to the other charge under s. 97 of the Act, the appellants could not take advantage of s. 97(2) which provides that a creditor is not obliged to supply a settlement statement under s. 97(1) where a request for a statement is made less than one month after a previous request. Here the initial request was by telephone and falls outside the scope of s. 97(2). There was no question of either party waiving the requirement that the request be in writing. Appeals dismissed.

Home Insulation Limited v. Wadsley Q.B.D. 92

CONTROL OF POLLUTION

Meaning of 'causing' pollution - s. 31(1), Control of Pollution Act 1974.

(1) When a prosecution is brought on the basis that the defendant caused poisonous, noxious or polluting matter to enter a stream, contrary to s. 31(1) of the Control of Pollution Act 1974, the relevant principles are:

(a) where the defendant conducts some active operation involving the storage, use or creation of material capable of polluting a river should it escape, and then it does escape and pollute, the defendant is liable if he 'caused' the escape;
(b) the question of causation is to be decided in a commonsense way;
(c) the defendant may be found to have caused an escape even though he did not intend the escape and even though it happened without his negligence;
(d) it is a defence to show that the cause of the escape was the intervening act of a third party, or an act of God, or *vis major;*
(e) when deciding whether an intervening cause constitutes a defence, the question is whether the intervening cause was of so powerful a nature that the conduct of the defendant was not a cause at all, but was merely part of the surrounding circumstances.

(2) Where the facts of a case are that there has been a failure in a drainage system maintained by the defendant, and this failure has caused excessive water to enter a storage tank containing polluting material, thus causing the polluting material to escape, it is irrelevant that the drainage system which failed did not form part of the system for storing the polluting material.

Appeal by way of case stated against a decision of Sevenoaks magistrates' court.

Trade effluent - whether breach of each condition attached to a consent is a separate offence - ss. 32 and 34, Control of Pollution Act 1974.

Where consent to the discharge of trade effluent has been granted subject to a number of conditions, discharge in breach of any number of those conditions constitutes a single offence, because the offence consists of discharging trade effluent other than in accordance with the terms of the consent.

Appeal: by way of case stated against certain decisions of the Shrewsbury justices.

Whether expert evidence can be sufficient to establish statutory noise nuisance - s. 58, Control of Pollution Act 1974.

1) When proving that noise amounting to a nuisance has occurred or recurred in contravention of a notice served under s. 58 of the Control of Pollution Act 1974, the prosecution (a) need not prove that a particular occupier of property has actually suffered interference with his reasonable enjoyment of his property, and (b) may rely solely on other evidence, including expert evidence.

2) When proving a breach of a requirement of a notice served under s. 58 of the 1974 Act that the recipient shall refrain from causing a noise nuisance to the occupier of any residential property, the prosecution (a) need not prove that a particular occupier of property has actually suffered interference with his reasonable enjoyment of his property, and (b) may rely solely on other evidence, including expert evidence.

3) *Per* Pill, J.: for the avoidance of doubt, it might be helpful if notices served under s. 58 of the 1974 Act specify which requirements are being imposed under subs. (1)(a) and which are being imposed under subs. (1)(b).

Appeal by way of case stated against a decision of the Leicestershire justices.

CORONERS' LAW

Application by coroner - s. 6 Coroners Act 1887 - s. 19 Coroners (Amendment) Act 1926 - further expert medical opinion following inquest - conflicting medical opinions - humanitarian matters taken into account.

The deceased, a nine week old infant, died on November 1, 1987. In the days before he was found dead in bed, his mother had been treating him with a drug called Calpol. In the early

hours of November 1, he was given a feed with a bottle into which the mother believed she had placed a small quantity of Calpol. She saw the child again at about 04.00 (differing times were given by the mother). He was still alive. When she next attended upon him at between 08.00 and 09.00, she found him dead. A post-mortem examination showed death to have been due to respiratory depression accredited to an overdosage of diphenhydramine. The pathologist at the inquest equated this to a fifth of a teaspoonful of a cough medicine called Benylin. The mother admitted that in the night she might have confused the Benylin bottle with the Calpol bottle. The coroner returned a verdict of accidental death. Following the press reports of the inquest, the manufacturers of Benylin instructed a Professor Lee to prepare a report dealing with the calculations made by the pathologist. Applying the principles of pharmacokinetics, the Professor calculated that 5.66 teaspoonfuls of Benylin must have been administered to the child. In the light of the further evidence, the coroner obtained the fiat of the Attorney General pursuant to s. 6 Coroners Act 1887 to apply to the High Court to quash his own inquest. Further expert evidence was placed before the Divisional Court.

Held: (i) The evidence as to the dosage, following the consideration of the four distinguished medical experts' opinions, is such that it is a matter of complete speculation whether or not a valid conclusion could be drawn at a further inquest;

(ii) Humanitarian aspects are matters which the court is entitled to take into account;

(iii) There is no real prospect that a different verdict would be reached if a further inquest were to be held.

Per Pill, J.: Applying the principles in *Re Rapier* and *R.* v. *South London Coroner, ex parte Thompson,* it is neither necessary nor desirable that a fresh inquest be ordered.

R. v. H.M. Coroner for West Suffolk, ex parte Humphrey Bill Walrond and Jacqueline Russell Q.B.D. 235

Coroners Rules 1984, rr. 20(1), 20(2),36 - judicial review of procedure - whether brother of deceased a person entitled to examine - sufficiency of inquiry - s. 6 Coroners Act 1887 - suicide verdict - s. 19 Coroners (Amendment) Act 1926.

The deceased was found hanging by a cord in the locked toilet within his locked cabin aboard H.M.S. Endurance at Portsmouth Navel Base on September 7, 1988. The eldest brother of the deceased was the only member of the family who wished to have legal representation at the inquest. The coroner refused to allow the brother's counsel to ask questions. A verdict of suicide was returned.

The brother obtained leave for judicial review on the grounds of procedural irregularity in the refusal of the coroner to permit the applicant's legal representative to ask questions at the inquest and a failure to make sufficient inquiry.

Held: 1. The coroner was not wrong in law in forming the opinion that the brother of the deceased was not a properly interested person within r. 20(2)(h).

2. The basic facts were not in dispute. In deciding if it was in the interest of justice to require a fresh inquest to be held, an important factor to be considered is the likelihood or otherwise of a fresh inquest arriving at a different verdict on the basis of the material which is or may become available.

3. Having regard to the overall position, and in any event, there were no grounds to quash the inquisition.

Obiter: (i) To serve the public interest there must be sufficient hearing of the evidence at the inquest itself, however overwhelmingly the material supplied to the coroner in advance of the inquest suggests a particular verdict.

(ii) Coroners should not regard the investigation in public as capable of performance in a perfunctory manner.

No inquest held - no body recovered - inquiry under the Merchant Shipping Acts - s. 61 Merchant Shipping Act 1970 - s. 18 Coroners (Amendment) Act 1926 - meaning of "in or near his jurisdiction" - Coroners Rules 1984 rr. 36, 41, 42, 43 - scope of the coroner's inquisition - discretion in High Court for extending time for application - whether inquest would serve useful purpose.

The deceased, a 17 year old, went out on a diving expedition with a more experienced diver. The two descended onto the scene of two wrecks lying eight or nine miles offshore. The deceased was never seen again and his body was not recovered. There was an inquiry under the Merchant Shipping Acts 1970 and 1979 into his death. The applicants, the parents of the deceased, were not satisfied with the inquiry and considered that there should be an inquest. The coroner took the view that he had no jurisdiction and he sought the advice of the Home Office. A distance of seven or eight miles offshore was considered by the Home Office not to be "near" the area of the coroner's jurisdiction within s. 18 Coroners (Amendment) Act 1926. The Home Office took the view that "in or near his jurisdiction" was to be construed as a matter of yards rather than miles.

On application for judicial review of the coroner's decision not to report the facts to the Secretary of State with a view to obtaining a direction as to the holding of an inquest into the death:

Held: 1. The question of whether or not a coroner has jurisdiction is to be judged by the coroner's belief and his assessment as to whether or not the death occurred in or near the area within which he has jurisdiction.

2. The word "near" being an ordinary word of the English language is to be applied by the coroner in a common sense manner and as long as the coroner approaches the matter in a way which is not wholly unreasonable it is not for the courts to define precisely what is meant by the word "near".

3. The Home Office approach as to "a matter of yards" is wrong. On the other hand, a distance of eight or nine miles offshore is beyond the coroner's jurisdiction.

Per Woolf, L.J.: (i) Section 18 Coroners (Amendment) Act 1926 is primarily concerned with situations where there could be a conflict of jurisdiction between adjoining jurisdictions of two coroners.

Section 13 Coroners Act 1988 - direction under Ord. 53 r. 9(4) R.S.C. - suicide verdict - satisfaction of the criminal standard of proof - new inquest.

The deceased was struck by a train at 10.30 p.m. whilst he was on a foot crossing and killed. The evidence was that he had had a normal, happy marriage, that he was devoted to his children and that the family had no money worries. The deceased had no history of depression and his blood alcohol at the time of death was only 54mg/100ml. In the afternoon of his death, the deceased, who was employed as a milkman, was arrested and subsequently charged with burglary for the theft of a purse from a house. Whilst in police custody he had not shown any intention to commit suicide and no suicide note was subsequently found. There was a hiatus in the story following his discharge from police custody until the time of his death. The description of the train driver and his mate of the deceased's conduct was at least as consistent with suicide as with accident. The coroner, sitting without a jury, recorded a verdict that the deceased killed himself. The widow obtained the Attorney General's fiat and leave to bring proceedings for judicial review.

Held: (1) There was not sufficient material before the coroner to prove any suicidal intent and no reasonable coroner could have come to the conclusion that the deceased killed himself. There was a real doubt as to the cause of death and an open verdict was right, anything else being unjust to the family of the deceased.

(2) The coroner appeared to have been unduly affected by what he regarded as likelihood and probabilities, both states of mind falling short of the criminal standard of proof which was held in *ex parte Armstrong* must apply.

(3) In the language of the court in *ex parte Barber,* there is "no single fact which definitely points to the deliberate taking of this man's life and every possibility that the matter was an accident".

R. v. H.M. Coroner for Northamptonshire, ex parte Anne Walker Q.B.D. 289

Verdict of "acute abuse of a drug" - definition of "drug" - ss. 4(3), 4(4), 18(2) Coroners Act 1887 - Coroners Rules 1984 rr. 36, 42, 60, sch. 4, form 22 and adequacy of notes thereto - requirement to record conclusions - guidance on verdicts - common law power to grant relief short of an order for a fresh inquest - quashing the verdict alone - remission of inquisition to coroner to enter verdict as considered necessary in the light of judgment.

The deceased, a boy of 14 years, died in a park in August 1986 following the voluntary inhalation of the solvent trichloroethane (Tippex thinning fluid). An inquest was held into the death without a jury. The coroner's basic conclusions were inevitable and were not challenged. However he recorded his verdict thus: "acute abuse of a drug".

The verdict distressed the family of the deceased and the mother brought an application under s. 6 Coroners Act 1887 and proceedings for judicial review to quash the offending part of the inquisition.

Held: (1) The coroner failed properly to exercise his discretion in relation to the verdict in that he wrongly believed he was bound to enter the verdict he did.

(2) In respect of the verdict the only statutory obligation upon the coroner is to record "in concise and ordinary language" as to "how ... the deceased came by his death".

(3) Trichloroethane in the context of the deceased's death cannot be properly described as a drug.

Obiter

Per curiam: (i) Nothing is said to encourage the resurrection of "misadventure" as a verdict following the dicta of Mann, J. in *R.* v. *Portsmouth Coroner, ex parte Anderson* (1988) 152 J.P. 56.

(ii) In respect of death such as that of the deceased any of the following expressions might be used as the verdict: "accidental death resulting from the inhalation of Tippex thinners", or "solvent abuse: inhalation of Tippex thinners", or "abuse of volatile substances".

(iii) The primary, if not the sole, purpose of entering a verdict of the kind here in question must be to alert the public to certain specific dangers. It is this desirable social end which, on occasion, justifies departure from the policy of not stigmatizing the deceased.

(iv) It is not necessary to quash the inquest in its entirety, the conclusion may be quashed alone and the inquisition remitted to the coroner to enter an appropriate verdict.

R. v. Southwark Coroner's Court, ex parte Kendall Q.B.D. 117

COPYRIGHT

Infringing article - whether sale within s. 21(1)(b) Copyright Act 1956 - where purchaser has no intention of buying article.

The respondent was employed as a sales engineer who made photographic copies of a work

which he knew to be infringing copies of that work. He made contact with a Dr. Webb and offered to sell the latter information in the copies. Dr. Webb had no intention of buying the information and informed the police. On the instructions of the police Dr. Webb arranged a meeting with the respondent. The respondent handed the information to Dr. Webb who handed over a cheque for £5,000. The police arrested the respondent who was charged with selling an article infringing s. 21(1)(b) of the Copyright Act 1956. Dr. Webb knew the police were present and had they not intervened he would have stopped the cheque. The defence submitted that as Dr. Webb had no intention to purchase there was no binding contract of sale. The magistrate accepted the submission and the prosecutor appealed. On appeal:

Held: Whether a contract had been concluded depends not on consideration of what is in the mind of the allegedly contracting parties but on objective consideration of what passed between them, whether in writing or by word of mouth or by conduct. On the facts, taking an objective view, there was a sale within the meaning of s. 21(1)(b) of the 1956 Act. The appeal would be allowed and the case remitted to the magistrate for further hearing.

Phillips v. Holmes Q.B.D. (D.C.) 44

CRIMINAL LAW

Case stated - criminal proceedings - whether High Court has jurisdiction to hear appeal by case stated from Crown Court on issue raised in appeal against summary conviction before final determination of the appeal.

The eight appellants were convicted at the magistrates' court on an information which alleged that they

> "did use towards another threatening, abusive or insulting words or behaviour whereby another person was likely to believe that unlawful violence would be used or provoked, contrary to s. 4 of the Public Order Act 1986."

On appeal to the Crown Court against conviction, it was submitted as a preliminary point that the offence of which the applicants had been convicted was unknown to the law and that the information on which the conviction was based was defective as disclosing no offence known to the law. The Crown Court rejected the submission but agreed to state a case for the High Court on that decision before hearing the evidence and posed the following questions:

1. whether the charges as laid disclosed an offence contrary to law upon which the appellants could be tried; and
2. whether, without amendment, a valid conviction could be entered using the wording of the charges as laid.

Before dealing with those questions, the Divisional Court considered whether or not it had jurisdiction to hear an appeal by way of case stated where the Crown Court had not concluded the hearing of the appeal from the magistrates' court, but had merely made an adjudication in the course of that hearing by way of a preliminary or interlocutory ruling. The relevant part of s. 28 of the Supreme Court Act 1981 provides that "any order, judgment or other decision of the Crown Court may be questioned" by way of case stated.

Held (dismissing the appeal): The High Court could not entertain an appeal from the Crown Court by way of case stated in a criminal case unless a final determination had been reached. To do so would be contrary to the practice of the Court and might well be in excess of jurisdiction. The word "decision" in s. 28 of the Supreme Court Act 1981 should be construed as meaning final decision.

In the special circumstances of the present case where the substantive issues had been fully argued, the Divisional Court expressed the following opinion, obiter dicta, on the merits of the appeal:

The Crown had rightly conceded that the information was defective in that the words "another person" should not have been used and that "that person" was intended. The information was also defective because it included "or provoked" and omitted "immediate". Notwithstanding the wide wording of s. 123 of the Magistrates' Courts Act 1980 and r. 100 of the Magistrates' Courts Rules 1981, a defendant could object to an information if it created some unfairness. In the present case the defects were not sufficient to render the charges or convictions bad in law as they were clearly mistakes and no unfairness was created for any of the appellants. Had the Court been dealing with the appeal by way of case stated, the two questions raised by the Crown Court would have been answered in the affirmative.

Appeal: by way of case stated by Robert Loade and seven other appellants against a decision of Plymouth Crown Court made in the course of an appeal from a conviction at Plymouth magistrates' court.

Loade v. Director of Public Prosecutions Q.B.D. 674

Criminal proceedings - defendant arrested and charged by police - whether private prosecutor entitled to take over prosecution except under authority of Director of Public Prosecutions.

The police had been granted a search warrant under s. 21A of the Copyright Act 1956 and sought assistance of the Federation Against Copyright Theft Ltd. (FACT) with regard to its execution. A considerable amount of material was recovered which resulted in the defendants being charged with conspiracy, they having been arrested by the police who were accompanied by representatives of FACT. When the defendants were charged at the police station a police officer (the custody officer for the purposes of s. 37 of the Police and Criminal Evidence Act 1984) read out the charges and signed the charge sheet as the officer taking the charge. Mr. Dixon representing FACT was present when the defendants were charged and signed the charge sheet as the "person charging". The defendants were bailed to attend at the magistrates' court.

It was the intention of the police that the case would be prosecuted by Mr. Dixon and FACT and accordingly the Crown Prosecution Service was not informed. At the committal proceedings the prosecution was represented by a solicitor on behalf of FACT and the justices upheld a submission on behalf of the defendants that he had no standing as prosecutor. Accordingly, they discharged the defendants for want of prosecution.

Held: 1. In charging the defendants the custody officer was carrying out the duties imposed upon him by ss. 37 and 38 of the Police and Criminal Evidence Act 1984 and he had no power to perform those duties on behalf of a private individual. Once criminal proceedings were so instituted on behalf of the police it was the duty of the Director of Public Prosecutions under s. 3(2) of the Prosecution of Offences Act 1985 to take over the conduct of the proceedings, and the Crown Prosecution Service on behalf of the Director was the only person entitled to conduct the proceedings unless the Director had appointed another person to do so under s. 5 of that Act. Accordingly the justices' decision was correct, but that did not prevent the applicants from commencing a further prosecution.

2. The fact that Mr. Dixon signed the charge sheet as the "person charging" (as had been the practice in the past to indicate the involvement of a private individual in the prosecution) was of no significance having regard to the fundamental changes made in criminal procedure by the 1984 and 1985 Acts.

The court then certified the following questions of law as of general public importance, but refused leave to appeal to the House of Lords:

"Whether a private prosecutor is entitled to take over a prosecution when a defendant has been arrested and charged by the police except with the authority and on behalf of the Crown Prosecution Service."

Application: for judicial review of a decision of the Ealing justices to discharge the defendants for want of prosecution.

R. v. Ealing Magistrates' Court, ex parte Dixon and Others Q.B.D. 505

Double jeopardy - defective information replaced by alternative charge - plea of not guilty to both - first information dismissed on no evidence being offered - whether defence of *autrefois acquit* available on alternative charge.

The defendant pleaded not guilty to a defective information alleging that he was in charge of a motor vehicle "and was unfit to drive having consumed so much alcohol that the proportion in his breath exceeded the prescribed limit, contrary to s. 5 of the Road Traffic Act 1972".

At an adjourned hearing the prosecution substituted an alternative information which alleged that he was in charge of a motor vehicle "after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to s. 6(1) of the Road Traffic Act 1972".

After the defendant had pleaded not guilty to the second information the prosecution offered no evidence on the original charge which the justices then dismissed. On application being made that the second information should also be dismissed on the *autrefois acquit* principle, the justices ruled that even without a trial on the merits, the second information could not be prosecuted again following the dismissal of the earlier information dealing wtih substantially the same offence. Accordingly they dismissed the alternative charge.

Held: Although an actual plea of *autrefois acquit* or *autrefois convict* could only be raised at a trial on indictment, the same principle applied in a summary trial. The real issue in the present case was whether the defendant was on risk in relation to the first information and whether there was a sufficient adjudication upon it by the justices to bring the principle into operation. The first information was so defective that if a conviction had been recorded upon it, that conviction would have been quashed.

On the authority of *Broadbent* v. *High* (1985) 149 J.P. 115; [1985] R.T.R. 359 the appeal would be allowed, but the Court preferred to rest its decision upon the proposition that the first information was so faulty in form and content that the defendant could never have been in jeopardy upon it and so its dismissal could not justify any defence of *autrefois acquit* on the second information.

The case would be remitted to the justices to hear the second information.

Note: In giving judgment May, L.J., reiterated the warning given in *Broadbent* v. *High (supra)* that justices should be very careful about the procedural steps they take in these and similar circumstances. In that case Watkins, L.J. said: "It would of course have been preferable had the justices stayed their hand with regard to the first information until they had heard the evidence on the second information and adjudicated upon it. In that event, no such argument [on the issue of *autrefois acquit]* as has been presented to this Court could possibly have been advanced".

Appeal: by way of case stated by the Gateshead justices in respect of their dismissal of an information against Frederick George Porthouse on the principle of *autrefois acquit.*

Director of Public Prosecutions v. Porthouse Q.B.D. 57

Financial penalties - payment by instalments - guidance on limits of time to pay.

The two appellants were each convicted at the Crown Court of an offence of wounding with intent and one of common assault. Following a remand for social inquiry reports Michael Olliver (aged 26) was sentenced to 18 months' imprisonment suspended for two years and ordered to pay a total of £1,800 in fines and costs by monthly instalments of £60 (which would take 30 months to pay) and Richard Olliver (aged 43) was sentenced to two years' imprisonment suspended for two years and ordered to pay a total of £7,348 in fines, compensation and costs - £3,000 to be paid within three weeks and the balance at £150 a month (which would take 29 months to pay). Imprisonment in default of payment was fixed as appropriate in each case.

In imposing financial penalties the Judge was concerned with the desirability of keeping out of prison people who could be dealt with otherwise and was concerned also to save the successful family carpentry business in which the appellants were employed and which was likely to go under if they were imprisoned resulting in 23 employees losing their jobs.

On appeal against the sentences it was submitted that the time it would take each appellant to pay the amounts imposed was too long.

Held: On a true reading of the authorities there was nothing wrong in principle in ordering the period of payment for fines and other amounts by instalments to extend over a period of two or even three years, provided it was not an undue burden and too severe a punishment having regard to the nature of the offence and the offender.

In the present case the totality of the sums imposed was proper having regard to the actual and prospective financial circumstances of the appellants. No doubt they would be caused difficulty and hardship, but the fact that they would be reminded over the months that what they had done was wrong was no bad thing. If the fine or compensation was within the capacity of the offender to pay over a period of two or three years in such a way that imprisonment in default of payment was very unlikely, then there was no reason why in the appropriate case that course should not be taken. Appeal dismissed.

Appeal: against sentences imposed at Salisbury Crown Court on the two appellants.

R. v. Olliver (Richard) and Olliver (Michael) C.A. (Crim. Div.) 369

Indictment containing mutually exclusive counts - whether both counts should be left to jury or whether prosecution must elect during trial on which count they wish to proceed.

The defendant was charged on an indictment which, *inter alia,* contained three counts of obtaining property by deception and, in the alternative, three counts of conspiracy to evade the prohibition on the importation of controlled drugs.

The broad outline of the prosecution case was that the defendant had obtained large sums of money from individuals by falsely pretending that the money would be used to buy drugs in the United States which would then be smuggled into this country and sold at a vast profit. As an alternative the prosecution included the conspiracy counts on the basis that if the defendant had not been deceiving those individuals and had, in fact, been intending to buy drugs in the United States, then he was guilty of a conspiracy with others to evade the prohibition on the importation of controlled drugs. The Judge in his summing up pointed out the alternative nature of the counts and directed the jury first to consider the conspiracy counts and only if they acquitted on them to consider the counts of deception.

The defendant was acquitted on the conspiracy charges and convicted on the three counts of deception. On appeal, the Court of Appeal quashed the convictions ruling that the prosecution should have been required to make an election at the close of their case and to decide whether to proceed on the deception counts or on the conspiracy counts. At the request of the Crown the Court of Appeal certified the following point of law of general public importance:

"Is it proper when an indictment contains mutually exclusive counts for both counts to be left to the jury for them to decide which, if either, count has been proven, or should the prosecution be obliged to elect during the course of the trial upon which count they wish to proceed?"

The expression "mutually exclusive" was used in the question to mean counts which were factually contradictory so that a conviction on one count necessarily involved an acquittal on the other count.

Held: There was no rule of law that prevented the inclusion in one indictment of mutually exclusive counts. If, at the end of the prosecution case, the evidence established a prima facie case on each of the counts, both counts should be left to the jury to determine which, if either, count had been proven and the prosecution should not be put to their election during the trial upon which count to proceed.

The appeal would be allowed and the three convictions for obtaining property by deception restored.

Appeal: by the Crown from a decision of the Court of Appeal (Criminal Division) allowing an appeal by Andre Patrick Bellman against his conviction at the Central Criminal Court of offences of obtaining property by deception.

R. v. Bellman H.L. 307

Judicial review granted to quash Crown Court dismissal of appeal against summary conviction - case not remitted to Crown Court - effect on the summary conviction.

The applicant was convicted of exceeding the speed limit when driving a motor vehicle and his appeal to the Crown Court against conviction was dismissed. He applied for judicial review by way of *certiorari* to quash the decision of the Crown Court on the ground that the appeal hearing was conducted in breach of natural justice. It was alleged that the Judge had failed to act impartially and had so intervened in the appeal proceedings that justice was not seen to be done. The prosecution did not resist the application.

Held: On the facts of the case it was clear that justice was not seen to be done by the manner in which the appeal proceedings had been conducted. An order of *certiorari* would be granted to quash the dismissal of the appeal by the Crown Court. In those circumstances it was not appropriate to remit the case to the Crown Court under O. 43, r. 9 of the Supreme Court Rules. The effect was that the conviction of the applicant by the magistrates' court and his related notice of appeal remained extant and it was a matter for him to re-instate his appeal against that conviction to the Crown Court.

Application: for judicial review of a decision of Leeds Crown Court dismissing an appeal by Irvin Barlow against his conviction at Dewsbury magistrates' court for speeding.

R. v. Leeds Crown Court, ex parte Barlow Q.B.D. 113

Legal aid - withdrawal of legal representatives - legal aid order not revoked - effect of refusal to assign fresh legal representatives.

The appellant was convicted on indictment of common assault as alternative to an assault occasioning actual bodily harm and was acquitted on two other assaults. Initially he was represented by solicitors and counsel on legal aid but on the second day of the trial they were allowed to withdraw after the appellant complained that his instructions were not being followed. When he asked for another solicitor the Judge pointed out that he had already had

three solicitors and refused an adjournment for fresh counsel and solicitors to be assigned on legal aid. Thereafter the appellant conducted his own case. He appealed against conviction on the ground that as the legal aid order had not been revoked he was still entitled to legal representation.

Held: Where, during a trial, the legal representatives assigned to a defendant under a legal aid order withdrew from the case, then unless the order was revoked under s. 31 of the Legal Aid Act 1974, the refusal of the court to assign fresh legal representatives was a material irregularity in the proceedings. In the present case the conviction would be quashed as it could not be said that the appellant had suffered no injustice and the proviso to s. 2 of the Criminal Appeal Act 1968 could not properly be applied.

Per McKinnon, J.:

"It appears to be not uncommon for courts to make the mistake of continuing with trials when counsel and solicitors withdraw, and the defendant is then unrepresented, without taking account of the provisions of the Legal Aid Act 1974 and of the Regulations to which I have referred. We would hope that our judgment will come to the attention of the whole of the legal profession, so that such a mistake will become a rarity in future."

Appeal: by Del Anthony Chambers against his conviction of common assault at Sheffield Crown Court.

R. v. Chambers C.A. (Crim. Div.) 544

Murder - defence of self-defence - issue of provocation not raised - evidence of self-induced provocation adduced - whether issue of provocation should be left to jury.

The appellant was charged with murder by stabbing the victim with a knife. His defence was that believing he was about to be attacked by the deceased with a glass, he was acting in self-defence. In view of that defence his counsel did not address the jury on the issue of provocation. The evidence was that following unpleasant and threatening behaviour by the appellant, he was taunted by a woman, who was with the victim, which made him angry. He was followed by the deceased who poured beer over him and pinned him against a wall. Whilst he was in that position the woman punched his head and pulled his hair. There were shouts that the deceased should drop the glass which he held in his hand and he did so. The appellant then produced a knife which he said he carried for his own protection and stabbed the deceased. Taking the view that it was inappropriate to leave the issue of provocation to the jury, the Judge did not direct them on that issue. The appellant was convicted.

Held: Under the provisions of s. 3 of the Homicide Act 1967 if there was any evidence that the accused lost his self-control in consequence of some provocation, the Judge was bound to leave to the jury the question whether a reasonable man might have reacted to that provocation as the accused did. Whether or not there were elements in the accused's conduct which justified the conclusion that he had started the trouble and induced others, including the victim, to act as they did, the defence of provocation should have been left to the jury.

In the present case the Court could not infer from the jury's verdict that they inevitably would have concluded that provocation as well as self-defence had been disproved. The conviction for murder would be quashed and manslaughter substituted on the basis of provocation.

Appeal: by Christopher Richard Johnson against his conviction at Sheffield Crown Court of murder.

R. v. Johnson C.A. (Crim. Div.) 533

Natural justice - bias - effect of Judge's indirect interest.

The appellant was convicted of conspiracy to rob persons at premises belonging to various banks and building societies. The trial Judge owned 1650 shares in one of the banks concerned, but he did not declare an interest in the case. The appellant appealed against conviction on the ground of bias.

Held (dismissing the appeal): (a) The principle that in a judicial context any direct pecuniary interest will result in the automatic disqualification of the decision-maker was irrelevant, because the Judge had no such interest; (b) the proper approach was to ask whether a reasonable and fair-minded person sitting in a court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible, and on the present facts this question must be answered in the negative; but (c) the function of a Crown Court Judge conducting a criminal trial on indictment with a jury is very different from that of a lay magistrate who is one of the primary decision-makers in summary proceedings in the magistrates' court.

Appeal against conviction.

R. v. Mulvihill C.A. 651

Procedure - adjournment - evidence - pending change in the law permitting court to convict on unsworn and uncorroborated evidence of child - whether court acting judicially in adjourning trial solely because of imminent change in the law.

By s. 38(1) of the Children and Young Persons Act 1933 a court may, in criminal proceedings, receive the unsworn evidence of a child of tender years who does not understand the nature of an oath. A proviso to that subsection required such unsworn evidence to be corroborated; but by s. 34 of the Criminal Justice Act 1988 that proviso was repealed as from October 12, 1988.

A juvenile was charged with wounding a boy aged 12. He pleaded not guilty and the case was set down for trial on October 11, 1988. When the case was called on the prosecution asked for an adjournment so that the magistrates could receive the unsworn and uncorroborated evidence of the victim. The prosecution indicated that if the case was not adjourned, as no corroborative evidence existed, they would offer no evidence and the defendant would be entitled to be acquitted. The magistrates agreed to adjourn the hearing.

The defendant applied for judicial review.

Held - allowing the application: The arguments against accepting some unqualified inalienable right or entitlement in a defendant to be tried on the law as it stood on the day which happened to be fixed for his trial were overwhelming. But it would not be judicial for a court to refuse to apply the substantive law on the grounds that the court regarded that law as unfair or wrong: *R.* v. *Boteler* (1864) 28 J.P. 453; (1864) 4 B. & S. 959. In the present case the magistrates concluded, in effect, that the law as it stood on October 11, 1988 would not do justice, or as much justice, as the law on the following day. They were, therefore, passing a qualitative judgment on the existing law and finding it wanting in justice, or sufficient justice. That was not a legitimate basis for ordering an adjournment. The decision to adjourn the hearing would be quashed and an order would be made prohibiting the magistrates from now proceeding with the trial.

R. v. Walsall Justices, ex parte W Q.B.D. 624

Procedure - securing the attendance of a witness at court - admissibility of documentary evidence under Police and Criminal Evidence Act 1984, s. 68(2)(a)(ii).

The appellant was convicted of burglary involving the theft of currency valued at £28,000 from a bank at which he worked as a window cleaner. At his trial the prosecution had intended (1) to prove that the money was missing by means of a computer print-out and (2) to prove that it had been put in a drawer in which the appellant's fingerprint was found, by calling a witness. That witness was the only person who could authenticate the computer print-out and prove where the money had been placed in the bank. The witness, however, was in South Korea and had been there for about seven months and the bank had failed to inform the Crown Prosecution Service that he would not be attending the trial. Both prosecution and defence were taken by surprise and, following submissions, the Judge allowed the documentary evidence to be admitted. On appeal against conviction:

Held: The question whether it was reasonably practicable to secure the attendance of a witness at court for the purpose of s. 68(2)(a)(ii) of the Police and Criminal Evidence Act 1984 must be examined not as at the time when the trial opened but against the whole background of the case. In the present case, as seven months had elapsed since the witness departed for South Korea, it was certainly not shown that it was not reasonably practicable to secure his attendance at the trial seven months later.

Appeal allowed and conviction quashed.

R. v. Bray C.A. (Crim. Div.) 11

Procedure - trial on indictment - whether Judge can exclude jury from court during a submission except at the request or with the consent of the defence.

The appellant was convicted on indictment of indecent assault. On appeal against conviction his counsel contended, *inter alia,* that the Judge was wrong in ruling that it was for the Judge and not for the defence to decide whether the jury should remain in court while a submission was being made. He submitted that on the authority of *R.* v. *Anderson* [1930] 21 Cr. App. R. 178 a jury should not be asked to leave the court except at the request of or with the consent of the defence *(Archbold,* 43rd edition, para. 4-303 at p. 477).

Held: In the present day circumstances it was for the Judge to have the final word as to whether the jury should or should not remain in court during a submission which was being made to him, whatever might have been the position when *R.* v. *Anderson (supra)* was decided.

Appeal: by Wayne Russell Hendry against his conviction at Leeds Crown Court for indecent assault.

R. v. Hendry C.A. (Crim. Div.) 166

Public order - using threat towards another person - whether presence of that other person necessary - Public Order Act 1986, ss. 4(1)(a) and 4(2).

The appellant was convicted of an offence under s. 4(1)(a) of the Public Order Act 1986. The facts as found by the justices were that two Customs and Excise officers accompanied by a bailiff went to the appellant's farm to recover outstanding value added tax. The two officers conducted their business with the appellant in the farmhouse while the bailiff waited in the car parked in the farmyard and was unable to hear any of the conversation in the farmhouse. When the officers ascertained that the appellant could not pay, they told him the bailiff would have to come in to distrain on his goods, whereupon the appellant said: "If the bailiff gets out of the car he's a dead 'un" and he repeated the threat several times. No threat was made towards the

officers themselves. One of the officers noticed a gun in the corner of the room and on the instructions of her colleague went to the car and told the bailiff that the appellant had a gun and was threatening him. The bailiff remained where he was and felt threatened. All three then left the farm.

The justices were of opinion that the appellant did not want the bailiff to enter the farmhouse and therefore he must have intended the officers to convey his threat to the bailiff in a bid to keep him out. They therefore concluded that the appellant had used the threatening words towards the bailiff and as he was not in the farmhouse, the exonerating provisions of s. 4(2) did not apply.

Held: The phrase "uses towards another person" in s. 4(1)(a) of the Public Order Act 1986 meant "uses in the presence of and in the direction of another person". In the instant case the bailiff could not be that other person because he was not in earshot and the words were not directed towards him. Secondly, the words "the other person" in s. 4(2) were a reference back to "another person" in s. 4(1)(a) being the person to whom the threatening, abusive or insulting words were addressed or used - namely the Customs and Excise officers. Accordingly as all concerned in the ambit of s. 4(2) were inside a dwelling, no offence was committed and the conviction would be quashed.

Appeal: by Ralph Charles Atkin by way of case stated against a decision of the Eccleshall justices whereby he was convicted of an offence under s. 4(1)(a) of the Public Order Act 1986.

Atkin v. Director of Public Prosecutions Q.B.D. 383

Public order - whether police officer is a person who could be caused harassment, alarm or distress by offensive conduct specified in s. 5(1)(a) of the Public Order Act 1986.

The defendant pleaded not guilty to an offence under s. 5(1)(a) of the Public Order Act 1986 and also to assaulting a police officer in the execution of his duty. The facts of the case were as follows: The defendant and his girlfriend were having an argument in a road within about 10 feet from the nearest house in a residential area and the defendant was using abusive language. Two police officers arrived and one of them told the defendant to be quiet, to which the defendant replied "You fuck off. This is a domestic and you can't do nothing". The officer told him he was causing a breach of the peace and advised him to quieten down and go home, to which the defendant responded abusively and threatened to hit the officer if he did not go away. He was arrested for causing a breach of the peace and put into a police vehicle in which he assaulted the other officer.

The justices decided that no offence under s. 5(1)(a) of the 1986 Act had been committed as the only persons present in the street were the defendant, his girlfriend and the two officers and, therefore, it was not open to the justices to infer that harassment, alarm or distress was likely to be caused to any person. They further concluded that as no offence had been committed under s. 5(1)(a) the arrest of the defendant under s. 5(4) was unlawful and the officer was not acting in the execution of his duty when he was assaulted. Accordingly they dismissed both charges.

On appeal by case stated the main issue before the court was whether a police officer could be a person who was likely to be caused harassment, alarm or distress by the threatening, abusive or insulting words or behaviour.

Held (allowing the appeal):

1. A police officer could be a person who was likely to be caused harassment, alarm or distress by the various kinds of offensive conduct to which s. 5(1)(a) of the Public Order Act 1986 applied. However, that did not mean that every police officer in that situation was to be assumed to be a person who was caused harassment, etc. It was a question of fact for the justices to decide in all the circumstances of the case whether the words or behaviour were likely to cause harassment, alarm or distress to the police officer concerned.

Marsh v. *Arscott* [1982] 75 Cr. App. R. 211, distinguished.

2. On the issue of the power of arrest under s. 5(4) of the 1986 Act if the police officer was not caused harassment, alarm or distress, it was difficult to see how he could reasonably suspect, if he was the only person present, that an offence under s. 5(1) had been committed since causation was a necessary element in the offence. If he did not reasonably suspect that such an offence had been committed then he had no power of arrest under s. 5(4) of the Act.

In the present case, however, the defendant had been lawfully arrested for causing a breach of the peace and not under s. 5(4) and it followed that the assault on the officer was committed when he was acting in the execution of his duty.

The acquittal in relation to the public order offence would be set aside but the case would not be remitted to the justices because of the lapse of time and the fact that the Crown were more interested in the establishment of the legal principle involved. The charge of assault would be remitted with a direction to convict.

Appeal: by way of case stated by the Bristol justices in relation to the correct interpretation of s. 5 of the Public Order Act 1986.

Director of Public Prosecutions v. Orum Q.B.D. 85

Sentencing - custodial sentence on young offender guilty of multiple offences - whether court entitled to aggregate totality of offences in assessing seriousness of offence under s. 1(4A)(c) of the Criminal Justice Act 1982 as amended.

The appellant, aged 19 years, pleaded guilty on indictment to two offences of handling stolen goods, two of obtaining property by deception and one of attempted deception, and 20 other similar offences were taken into consideration. She was sentenced to a total of six months' detention in a young offender institution. On appeal against sentence:

Held: In considering whether a person under 21 years of age guilty of multiple offences qualified for a custodial sentence under s. 1(4A)(c) of the Criminal Justice Act 1982 as amended by s. 123 of the Criminal Justice Act 1988, it was not proper or appropriate for the court to aggregate the totality of the series of offences together so as to conclude that the aggregate made them so serious that a non-custodial sentence could not be justified. The proper approach was for the court to consider each of the individual offences and only if any one of those offences fell within the statutory criterion was the court justified in passing a custodial sentence.

In the present case the custodial sentence would be quashed and a probation order substituted.

Appeal: by Nicola Suzanne Thompson against sentence imposed by Derby Crown Court.

R. v. Thompson C.A. (Crim. Div.) 593

Violent disorder alleged against four co-defendants - only two convicted - no other person involved - need to establish that three or more persons used or threatened violence - on appeal convictions for affray substituted.

The two appellants were involved in a fight with two co-defendants and all four were indicted for an offence of violent disorder contrary to s. 2 of the Public Order Act 1986. At the trial one of the co-defendants was acquitted and the jury being unable to agree in respect of the other co-defendant were discharged from giving a verdict in his case. No other person was involved in the disturbance. The two appellants were convicted. On appeal it was submitted on their behalf that under s. 2 it was a condition precedent to conviction that the jury must be satisfied that three or more persons were present together using or threatening unlawful violence and therefore the conviction of only two defendants was unlawful.

Held: On a charge under s. 2 of the Public Order Act 1986 where the only persons against whom there was evidence of using or threatening violence were those named in the indictment, unless the jury were satisfied that at least three of the defendants were using or threatening violence, all the defendants must be acquitted.

In the circumstances of the present case where no other person was involved, the conviction of the two appellants under s. 2 must be quashed. The jury, however, were entitled under s. 6(3) of the Criminal Law Act 1967 (which was preserved by s. 7(3) of the Public Order Act 1986) to convict the appellants of affray under s. 3 of the 1986 Act, and as they must have been satisfied of the facts which constituted that offence, convictions for affray would be substituted for the quashed convictions under s. 2.

Appeal by Sean Michael Fleming and Vincent Robinson against their conviction at Acton Crown Court of violent disorder contrary to s. 2 of the Public Order Act 1986.

EDUCATION

Disclosure of pecuniary interest by teacher/governors when the question of converting a school into a city technology college arises - Education (School Government) Regulations 1987.

(1) When the governing body of a school is considering whether the school should be converted into a city technology college, a governor who is also a teacher at the school has a direct pecuniary interest in the matter because, if the city technology college comes into existence (a) those teachers who join its staff are likely to be paid more than teachers at other establishments; (b) those teachers who do not join its staff may receive redundancy payments; and (c) the fact that the creation of the city technology college depends on the completion of other stages in the decision-making process is not sufficient to make the prospects of receiving either higher salaries or redundancy payments too vague or remote.

(2) The question of conversion into a city technology college is an "other matter" within the meaning of the Education (School Government) Regulations 1987; therefore (3) a governor who is also a teacher at the school should (a) declare his interest; (b) withdraw from the meeting at which the matter is being discussed unless the governing body permits him to remain; and (c) neither speak nor vote while the matter is being discussed.

Appeal against a decision of Jowitt, J., sitting in the Queen's Bench Division of the High Court.

Whether free school transport is necessary for the purpose of facilitating education - ss. 39 and 55, Education Act 1944, as amended.

1) Under s. 55 of the Education Act 1944, it is a matter for the exercise of each local education authority's judgment, in the light of the facts of individual cases, to decide whether free transport is necessary for the purpose of facilitating a pupil's attendance at school (in the sense of being really needed in order to promote such attendance).

2) It was clearly the intention of Parliament that children living within the statutory walking distance of their school would normally walk to school, accompanied by another person as may be necessary, and a local education authority, having formed the opinion that it was reasonably practicable for a child to be accompanied, was entitled to take that factor into account when deciding whether or not to provide free transport to school.

Appeal against a decision of the Court of Appeal.

ENVIRONMENTAL HEALTH

Scope of conditions attached to waste disposal licences - matters to be alleged by prosecution in proceedings for breach of conditions attached to waste disposal licences - Control of Pollution Act 1974.

(1) Although a waste disposal authority has very wide powers to attach conditions to waste disposal licences, those powers do not extend to prohibiting the creation of public nuisances of all kinds.

(2) Where a nuisance is created in circumstances which constitute a breach of a condition validly attached to a waste disposal licence, the nuisance itself is *prima facie* evidence that there has been a failure of operation or management, and therefore it is not necessary for the waste disposal authority, when bringing a prosecution, to identify a specific failure, although, of course, the defendant will have the opportunity of raising the defence under s. 3(4)(d) of the Control of Pollution Act 1974, to the effect that he took such steps as were reasonably open to him to ensure compliance with the condition.

Reference under s. 36 of the Criminal Justice Act 1972.

Whether noise can be a statutory nuisance under the Public Health Act 1936 - whether expert evidence is needed to justify a finding of prejudice to health - whether a local authority which fails to employ adequate sound insulation measures in its premises, with the result that its tenants' health is prejudiced by noise, is a person by whose act, default or sufferance the nuisance arose or continued - need for magistrates' courts to use discretion and commonsense when imposing remedial requirements on local authorities - ss. 92 to 99, Public Health Act 1936.

The appellant local authority owned certain flats, which had been created by way of conversion, and the respondents were tenants of two of those flats. The flats adjoined both a railway and a road. At the time the flats were created, the appellant took no adequate sound insulation measures. The respondents complained to a magistrates' court, under s. 99 of the Public Health Act 1936, that the flats were statutory nuisances on the basis of the amount of noise which penetrated them, and that the appellant was a person by whose act, default or sufferance the nuisance had arisen and had continued. The magistrates' court found the case proved and made an order requiring the appellant to take certain specified remedial action. On appeal to the High Court,

Held (dismissing the appeal): (a) The flats could not come within that limb of the definition of "statutory nuisance" which consisted of "premises which are a nuisance", because they did not interfere with anyone outside the premises; but (b) the flats could fall within the other limb of the definition of "statutory nuisance", namely that they were prejudicial to health, because prejudice to an occupier's health was sufficient; and (c) noise was capable of causing injury to health; and (d) the magistrates' court had been entitled to find that there was prejudice to health even without hearing expert evidence to that effect; therefore (e) the order would be upheld; but nevertheless (*per* Woolf, L.J.) (f) the crucial finding of fact in the present case was that no adequate sound insulation measures had been taken when the premises were converted into flats; therefore (g) the position would not be the same if such measures had been taken and noise had still penetrated into the flats; and (h) in any event, magistrates' courts disposing of statutory nuisance cases should not only use discretion and commonsense generally, but

more particularly, should have regard to local authorities' resources and to their obligations to their tenants as a whole.

Appeal by way of case stated against a decision of a magistrates' court.

Southwark London Borough Council v. Ince and Williams Q.B.D. 597

EVIDENCE

Admissibility of photofit picture.

The appellant was convicted of robbery and of possessing an imitation firearm with intent and sentenced to seven years' youth custody on each count concurrent. The facts of the case were that a witness M having collected the wages for his employees from his bank was in his car when a man held a gun against his head through the open sun roof and demanded the money and the keys. These were handed over and the man ran off and got into the passenger seat of a waiting car which then drove away. That car was traced and forensically examined and the appellant's fingerprints were found on the nearside front window and on a match box in the car. With the help of the police M made a photofit picture of the robber from his recollection of what he had seen. The appellant was later arrested and a gun was found at his home which he admitted was his. He was later identified by M in a confrontation. The car had been sold to the appellant's brother two weeks before the robbery.

At the trial the Judge upheld a defence submission that the confrontation evidence should not be admitted to the jury, so that there was no evidence of identification of the appellant. The Judge, however, refused to exclude the photofit from evidence, and the appellant was convicted. On appeal, *inter alia,* against the admission of the photofit evidence:

Held (dismissing the appeal): Following the decision in *R.* v. *Cook* (1987) 84 Cr. App. R. 369, photofit pictures, together with photographs and sketches, were in a class of their own to which neither the rule of hearsay nor the rule against the admission of an earlier consistent statement applied. The Judge was right to admit the photofit in law. He had correctly directed the jury as to its use, saying "Nobody pretends to identify [the appellant], all they do is give descriptions and produce the photofit which are consistent, you may think, with [the appellant], but it does not go any further than that." It was unnecessary for the Judge to add some kind of *"Turnbull"* warning about the photofit as, in his summing-up, he had stated the description of the robber which had been given by M.

Appeal: by Richard Constantinou against his conviction at the Central Criminal Court of robbery and a firearm offence.

R. v. Constantinou C.A. (Crim. Div.) 619

Breach of Code of Practice under Police and Criminal Evidence Act 1984 - whether evidence obtained must be excluded.

In connexion with a serious indecent assault on a three year old girl the appellant, who was 17 years of age and educationally subnormal, was interviewed by the police. His personality, according to a psychologist, was such that when being interviewed as a suspect his quick emotional arousal might lead him to wish to rid himself of the interview by bringing it to an end as quickly as possible. During the first interview at the police station which lasted 1½ hours the two interviewing officers were at pains to miminize the gravity of the offence and to suggest that the real requirement of the offender was psychiatric help. It was only at the very end of that interview that the appellant, after a series of denials, admitted that it was he who had

assaulted the little girl and followed that with further admissions in subsequent interviews. However, a record of that first interview was not made until the following day in breach of the Code of Practice (C) 11.3 and 11.4 made under s. 66 of the Police and Criminal Evidence Act 1984. Those admissions were, in effect, the whole basis of the prosecution case.

At the trial it was submitted by the defence that the Judge was under a duty to reject the confession by virtue of s. 76 of the 1984 Act and that in his discretion under s. 78 of that Act he should reject it. Whilst accepting that there had been a flagrant breach of the Code, the Judge ruled that the confessions should be admitted. The appellant was convicted.

Held: The mere fact that there had been a breach of the Codes of Practice did not of itself mean that the evidence obtained had to be rejected. It was no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice.

In the present case, however, by failing to make a contemporaneous note or indeed any note as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what happened during the interviews and what did induce the appellant to confess. Having regard also to the long term expectations of the appellant based on the assertion by the police officers that treatment rather than punishment was required, the Judge should have excluded the confessions, particularly so against the background of the appellant's age, his subnormal mentality and the behaviour of the police.

The conviction was unsafe and unsatisfactory and the appeal would be allowed.

Appeal: by Joseph Patrick Delaney against his conviction at Lewes Crown Court for indecent assault.

R. v. Delaney C.A. (Crim. Div.) 103

Defence of automatism - limitations on admissibility of doctor's evidence of fact and opinion founded on hearsay - whether evidence of opinion relating to matters within knowledge and experience of justices admissible.

The appellant was charged at the magistrates' court with three offences of theft from motor cars. The facts of the case were that the appellant, who had been drinking, was arrested on suspicion having been observed moving stealthily around some parked cars and trying their doors. All the property in the three charges was found in his possession. At the police station the custody officer noticed that his condition was affected by drink but he had no difficulty in replying to the officer's questions or in understanding what was taking place. At his trial the appellant raised the defence of automatism on the ground that he had, or might have had, no control of his actions because of his long term abuse of alcohol. Evidence of the degree of his intoxication on the occasion in question was given by two witnesses and by the appellant himself who, however, said no more than that he had been drinking and had no memory of the material events.

The defence then sought to adduce evidence of a consultant psychiatrist who had specialist knowledge of alcohol abuse, but the prosecutor contended that such evidence would be inadmissible. In order to ascertain what that evidence was, the doctor was allowed to give evidence in chief and be cross-examined. His conclusion that the appellant was acting as an automaton was based on the assumption that the facts as related to him by the appellant (including details of his past alcohol abuse) were correct.

The justices ruled that although the doctor's evidence was relevant, it was nevertheless inadmissible because:

a) it was based on hearsay,
b) it dealt with matters within their knowledge and experience, and
c) it was self-serving.

They convicted the appellant and imposed a conditional discharge in each case. On appeal by case stated:

Held: Evidence of a doctor, both of fact and opinion, was admissible if

1. it was relevant on an issue in the case,
2. it was not hearsay,
3. in so far as it was evidence of opinion
   (a) it was not founded on hearsay and
   (b) it related to matters outside the knowledge and experience of the tribunal of fact.

In the present case the justices were right in the approach they adopted and in their conclusion that the whole of the doctor's evidence offended against the rules and was inadmissible. Their view that his evidence was also self-serving was, however, unsound.

Appeal dismissed.

Per McCullough, J.: "... there are frequently cases when, without objection being taken, the evidence of a doctor in a criminal case includes both hearsay and opinion based upon hearsay. However, the fact that the rule against hearsay is, for reasons of good sense and practicality, not invariably enforced does nothing to deny its existence. When objection is taken the rule is to be applied."

Appeal: by way of case stated against a decision of the Stockport justices that the evidence of a doctor was inadmissible on the issue of automatism raised as a defence by the appellant Andrew Wood.

Wood v. Director of Public Prosecutions Q.B.D. 20

Power to exclude unfair evidence under s. 78 of the Police and Criminal Evidence Act 1984 - test to be applied.

The appellant pleaded not guilty to a count of indecently assaulting a 9 year old girl. The facts were that the appellant asked the girl in the street for the whereabouts of a road and when she ignored him he followed her, threatened to kill her and indecently assaulted her. When she got home she described him to her parents as wearing a black jacket and jeans and said that she had seen him the day before. The girl's father, looking for her assailant, saw the appellant who was wearing similar clothing and brought him, after a struggle, to the house next door. The girl was brought out and identified the appellant over a hedge without his jacket on about 15 minutes after the incident occurred. The girl throughout was very distressed. The appellant denied being her attacker.

At his trial and in the absence of the jury defence counsel submitted that all the identification evidence should be excluded under s. 78 of the Police and Criminal Evidence Act 1984 as being unfair. The prosecution contended that in the absence of some element of illicitness or impropriety the court was not entitled to exclude the evidence under that section. The Judge admitted the evidence and the appellant was convicted.

Held: In considering whether or not to exclude evidence under s. 78 of the Police and Criminal Evidence Act 1984 the court was under a duty to take into account all the circumstances of the case and then ask the question: Will the admission of the relevant evidence have such an effect on the fairness of the proceedings that the court ought not to admit it? The section could be applied even in the absence of impropriety. In the present case the decision to admit the evidence was not perverse or so unreasonable as to justify allowing the appeal on that point.

However, having regard to other aspects of the case the court had a lurking doubt as to whether an injustice had been done and the verdict must be considered as unsafe and unsatisfactory and on that ground alone the appeal would be allowed.

Appeal: by Terence O'Leary against his conviction at Liverpool Crown Court for indecent assault.

R. v. O'Leary C.A. (Crim. Div.) 69

Questioning a juvenile near scene of crime - whether his admissions admissible in evidence or must be excluded under Police and Criminal Evidence Act 1984, s. 76(2).

The appellant, aged 15 years, together with another juvenile were observed by police officers acting in a suspicious manner when one of them pushed open the door of an off-licence leading to a flat. The appellant ran off but was caught by the officers and denied being near any flat. He was arrested and taken to a police car where he was questioned. The officer said to him "Look, you've both been caught. Now tell us the truth". The appellant made no reply and the officer said "It's for your own good. Don't be stupid". Thereafter the appellant made an admission. The conversation was recorded about an hour later but was never shown to the appellant.

At the trial the assistant recorder ruled that the questioning did not amount to an interview within the Codes of Practice and overruled a submission that the confession should be excluded under s. 76(2) of the Police and Criminal Evidence Act 1984 as having been rendered unreliable by reason of several breaches of the Codes. He also declined to exercise his discretion to exclude it under s. 78 of the Act.

Held: The Codes of Practice under the Police and Criminal Evidence Act 1984 did not prevent a police officer from asking questions at or near the scene of a suspected crime to elicit an explanation which, if true or accepted, would exculpate a suspect. If in the course of such questions the suspect, even if a juvenile, made admissions, they were *prima facie* admissible even though no adult was present. On the issue whether the questioning was an interview within the Codes of Practice, the case was distinguishable from *R.* v. *Absolam* [1988] Crim. L.R. 748 in that the purpose of the questioning in that case (where there was a clear case of possessing drugs) was to elicit an admission to the more serious offence of possession with intent to supply. In the present case the purpose of the questions was to give the person arrested the opportunity to give an innocent explanation of his conduct if one existed. The assistant recorder was correct in ruling that the officers' questioning did not amount to an interview.

The conclusion of the assistant recorder could not be faulted. Even if there were breaches of the Code of Practice, that did not mean the evidence had to be rejected (*R.* v. *Delaney* (1989) 153 J.P.103). Each case had to be determined on its own particular facts. The appeal against conviction would be dismissed.

Appeal: by M (a juvenile) against his conviction at Knightsbridge Crown Court.

Re M (a juvenile) C.A. (Crim. Div.) 645

Voice identification from tape recordings - whether jury entitled to hear comparative tapes upon which expert opinion based.

The appellant was charged with two offences of being knowingly concerned with the fraudulent evasion of the prohibition of the importation of drugs. The drugs were concealed in two wooden statues which had been brought from Accra by a co-accused who alleged that they were to be collected under arrangements to be made by telephone to her address, and she would be paid £200. A number of telephone calls to that address were recorded and in the first three of these the caller (who called herself Margaret) clearly indicated she knew the carvings had to be collected. In later calls the appellant made arrangements to meet the co-accused and pay her money on behalf of Margaret, but no indication was given that the appellant expected to collect the statues. When they met the statues were handed to her by the co-accused.

The prosecution case was that the appellant had gone there to collect the statues and must have known what was in them. They therefore sought to show that the appellant was the person who called herself Margaret in the first three tapes and called an expert witness who gave his opinion in support of that view. A contrary opinion was expressed by a defence expert witness who wished to adduce in evidence a looped tape which he had prepared from the recordings and the appellant's own voice. His purpose was to point out to the jury the dissimilarities between the "Margaret tapes" and the others. The Judge refused to admit the tape in evidence. The appellant was convicted.

On appeal against the Judge's ruling:

Held (allowing the appeal): Where an expert witness gave evidence as to voice identity and based his opinion on a comparative tape recording which he had prepared, the jury were entitled to hear that prepared tape to assist them in assessing the weight to be attached to his evidence.

Appeal: by Cecilia Bentum against her conviction at Isleworth Crown Court of two drug offences.

R. v. Bentum C.A. (Crim. Div.) 538

FACTORIES

Meaning of 'process' - Factories Act 1961 and Asbestos Regulations 1969.

For the purposes of the Asbestos Regulations (S.I. 1969 No. 690), the word 'process' means any operation or series of operations being an activity of more than minimal duration, and is not confined to manufacturing processes or other continuous or regular activities carried on as part of the normal operation of a factory.

Appeal against a decision of a Divisional Court of the Queen's Bench Division of the High Court.

Nurse v. Morganite Crucible Limited H.L. 398

FIREARMS

Firearms Act 1968, s. 57 - whether air rifle is a lethal weapon - need for evidence as to its working order and capacity to injure.

The appellant was convicted of trespassing on land with a firearm contrary to s. 20 of the Firearms Act 1968 and having a firearm with him, having previously been sentenced to imprisonment for three years or more, contrary to s. 21 of that Act. The justices found that he had driven on a private road with his son in the passenger seat and they were in possession of an air rifle. There was no evidence before the justices as to whether the weapon worked or was capable of being made to work or as to its capacity. No tests were performed in court although the justices saw and examined the weapon. There was, however, evidence of a gamekeeper that on three occasions when the car was stopped, he saw a gun protruding from the car window and on one occasion a bird rose and flew away. No ammunition was found in the car. The justices overruled a submission that the prosecution had not proved that the rifle was a firearm within the meaning of s. 57 of the Act, concluding that they could find that it was a weapon which was capable of causing injury from which death might result if the weapon was misused and therefore could be lethal within the terms of that section. No evidence was called on behalf of the appellant and the justices convicted.

Held (allowing the appeal): The test applied by the justices as to what constituted a firearm within s. 57(1) of the Firearms Act 1968 was correct. Their error lay in their approach to determining whether, on the evidence, the prosecution had proved that the air rifle satisfied that definition. Their inquiry should have involved two issues: (1) whether the weapon was one from which any shot, bullet or other missile could be discharged or whether it could be adapted so as to be capable of discharging such a missile and (2) if so satisfied, whether it was a lethal barrelled weapon. In the present case there was no evidence before the justices that the weapon had been fired or as to whether it worked or was capable of being made to work, or as to what its capacity was.

Appeal: by Henry Grace by way of case stated against his conviction by the Ormskirk justices of two offences in relation to a firearm.

Grace v. Director of Public Prosecutions Q.B.D. 491

FOOD AND DRUGS

Relevant limitation period for prosecution for breach of Poultry Meat (Water Content) Regulations 1984 - Magistrates' Courts Act 1980; Food Act 1984.

In accordance with s. 95(2)(b) of the Food Act 1984, the relevant limitation period for laying an information in respect of a prosecution for an offence under reg. 11(1) of the Poultry Meat (Water Content) Regulations 1984, is two months from the procuring of the relevant sample, and the usual period of six months from the commission of the offence, under s. 127(1) of the Magistrates' Courts Act 1980, is irrelevant.

Appeal by way of case stated against a decision of the justices for the County of Kent sitting as a magistrates' court in the Petty Sessional Division of Ashford & Tenterden.

Kent County Council v. Peter Thompson Poultry (1982) Ltd. Q.B.D. 525

HACKNEY CARRIAGES

Definition of 'hackney carriage' and of 'street' for the purposes of licensing - ss. 38 and 45, Town Police Clauses Act 1847.

Each appellant was the driver of a purpose-built taxi of the style commonly known as a 'black cab', in respect of which a hackney carriage licence had been issued by Birmingham Metropolitan Borough Council, but not by the respondent council. Each appellant's vehicle was seen standing, within the area of the respondent council, on the taxi rank at Airport Way, Birmingham International Airport. In due course, each appellant was charged with four offences, namely, standing, plying for hire and driving a hackney carriage at Airport Way, and, fourthly, of driving a hackney carriage in a street in Solihull, but outside the airport, all in the area of the respondent local authority from whom no licence to ply for hire had been obtained.

The appellants argued that they had committed none of the offences, because the public had no legal right of access to Airport Way, where the taxi rank was situated, which was therefore not a 'street' within the meaning of s. 38 of the Town Police Clauses Act 1847, and that it followed that, *quoad* the respondent council, their taxis were not hackney carriages within the meaning of s. 38 of the 1847 Act, because they were not standing or plying for hire in a street within the area of the respondent council. In respect of the fourth charge the appellants

argued that, if they were acquitted on the first three charges they could not be convicted on the fourth because it was not an offence under s. 45 of the 1847 Act to drive a vehicle within the area of a council when the vehicle was not a hackney carriage *quoad* that council.

The magistrates convicted each of the appellants on all four charges.

On appeal to the High Court by way of case stated,

Held (allowing the appeal): (a) No offence is committed under s. 45 of the Act unless the vehicle concerned is a 'hackney carriage' within the meaning of the Act; (b) s. 38 of the Act contains an exhaustive definition of 'hackney carriage' for the purposes of the Act in terms of the vehicle's use rather than its design, and the use in question is limited to use in streets within the area of the council seeking to enforce control through the scheme of licensing; (c) for the purposes of s. 38 of the Act, land is not a 'street' unless the public, including taxi drivers in their taxis, have a legal right of access to it, and the fact that the public, including taxi drivers, do in fact resort to a particular place in large numbers, does not in itself make a location a 'street' for the present purposes; and (d) since the appellants were entitled to acquittals on the first three charges, they were also entitled to acquittals on the fourth charge, because if their taxis were not otherwise 'hackney carriages' *quoad* the respondent council, the mere driving of their vehicles through that council's streets could not in itself make them into hackney carriages *quoad* that council.

Appeals by way of case stated from certain decisions of the Solihull justices.

Young and Allen v. Solihull Metropolitan Borough Council Q.B.D. 321

LICENSING

Application for certificate under s. 68 Licensing Act 1964 - requirement that intoxicants be sold or supplied as ancillary to meals in a part of the premises 'usually set apart' - meaning of phrase in the light of decision of licensee to reserve for diners an area at specific times by planters and screens together with notice marked 'reserved for diners' - whether necessary at law for greater degree of permanence.

The licensee of "The Lowes Arms" at Woodley applied to the licensing committee for a certificate under s. 68 Licensing Act 1964 in respect of a part of the premises that were delineated on a plan. That part was to be set aside on Mondays to Saturdays from 11.00 a.m. to 3.00 p.m. and from 5.30 p.m. to 8.30 p.m., and on Sundays from 12 noon to 7.00 p.m. It was to be reserved for persons taking table meals. During meal hours that part was to be separated from the rest of the licensed premises by a screen or tubs containing flowers and planters, and by a notice indicating that that part was reserved for diners. Although the planters and screens would be moved outside meal hours from time to time, they would be returned so as to separate the dining area and the non-dining area during all times so designated and required by an order under s. 68. The committee was satisfied that the conditions laid down in the section had been fulfilled and granted the certificate. The appellant asserted that the phrase 'usually set apart' should be construed not in the context of the limited licensing hours but in the context of the day as a whole, and thus required a totally separate part of the premises.

Held: The appeal would be dismissed. The magistrates had not erred in any way or misdirected themselves on the facts. The purpose of s. 68 was clear, and the phrase 'usually set apart' contained three ordinary English words which had an ordinary meaning, and the question for the justices was whether on the facts found by them the relevant part of the public house was usually set apart within the meaning of those words in s. 68(2) Licensing Act 1964.

Appeal: by the Chief Constable of Greater Manchester by case stated against a decision of the licensing committee at Stockport to grant to the respondent a certificate under s. 68 Licensing Act 1964.

Application for off licence - existence of justices' policy relating to sales from a 'shop within a shop' - requirement that justices must consider whether policy applicable in every case - decision made solely in accordance with policy - Licensing Act 1964 ss. 1 and 3.

The applicants applied to the licensing justices at North Tyneside for a new off licence. The justices had adopted and published a policy requiring sales of intoxicants in supermarkets which had the benefit of an off licence to be by means of a 'shop within a shop' in order that adequate control could be kept of prospective purchasers. The applicants knew of this policy and when the application was heard evidence was called in detail which went to combat any effect that the policy might have upon the success or otherwise of the application. After retiring to consider the matter, the justices returned to court and the chairman announced that the application was in breach of the written policy and "we cannot therefore allow the application which is refused". The applicants appealed to the Divisional Court for an order of *certiorari* to quash the decision.

Held: Judicial review had to go, and there would be an order of *certiorari* to bring up the justices' decision and quash it. The court could not be satisfied that the justices in this case had decided the application for an off licence other than solely in accordance with their policy. The matter would be remitted to another bench of justices so that the original application could be determined according to law.

Appeal: by the applicants James Todd and Kenneth Lewis for judicial review directed to the justices of North Tyneside in respect of a decision refusing an application for an off licence made on July 15, 1987.

Evidential basis on which a magistrates' court should proceed when hearing an appeal against a refusal of a local authority's licensing sub-committee - Greater London Council (General Powers) Act 1968; Magistrates' Courts Act 1980; Magistrates' Courts Rules 1981.

The licensing sub-committee of the appellant local authority refused an application for registration of certain premises as a night cafe, under the Greater London Council (General Powers) Act 1968. Before coming to this decision, the sub-committee had regard to a variety of matters, including some which would not have been admissible in a court on the basis that they were hearsay.

The applicant succeeded on appeal to a magistrates' court, where the stipendiary magistrate held that he could have regard only to matters which were admissible according to the law of evidence relating to civil cases. On the local authority's appeal by way of case stated to a Divisional Court of the Queen's Bench Division of the High Court,

Held (allowing the appeal): (a) Provided the licensing sub-committee acted fairly, it was entitled to have regard to material which would not ordinarily be admissible in civil proceedings in a court of law; (b) an appeal to a magistrates' court against a decision of a licensing sub-committee is in the nature of a re-hearing on the merits, and is neither an appeal

on a point of law, nor a review; therefore (c) a magistrates' court should proceed on the same evidential basis as the licensing sub-committee, and accordingly a magistrates' court is not governed by the rules of evidence applicable in civil proceedings, but is entitled and required to admit all the evidence which was before the local authority's licensing sub-committee.

Appeal by way of case stated against a decision of a metropolitan stipendiary magistrate.

Westminster City Council v. Zestfair Q.B.D. 613

Provisional grant of on-licence - application to declare grant final - procedure laid down under s. 6(4) and (4A) Licensing Act 1964 - whether justices had by a policy decision fettered discretion conferred by the section.

The licensing justices for the City of London had granted a provisional on-licence to a Mr. Cload, a regional director of the applicant company in respect of premises in New London Street. In October 1988 notice was given of an application to have the grant declared final. It was uncertain whether this declaration was sought for October 27, 1988 or whether the applicants intended to use the new procedure in the Licensing Act 1988, which introduced subss. 4A, 4B and 4C into s. 6 of the 1964 Act. A telephone conversation made on behalf of the applicants to the office of the clerk to the licensing justices elicited the reply that it was not the policy of the justices at that time to send a single justice and that an application for final order should be made on October 27. A justice did visit the premises before that date, but at the hearing on the 27th, it was made clear that the applicants intended to follow the new procedure and called evidence that the works would be completed on time. That evidence was not challenged but the views of a fire officer and an environmental health officer were sought. The justices did not find that the premises would be ready before the next sessions, and therefore the procedure conferred by the new subsections could not be applied. The applicants sought judicial review of the decision seeking to have it quashed.

Held: The justices had considered the application on its merits, for other applications were heard and one was granted on the basis of the new procedure. There was nothing wrong with the rejection by the justices of the matter, both on factual grounds and in the exercise of their subsequent discretion. The applicants had failed at the initial stage because they had not established that the work was likely to be concluded in time.

Appeal: by application for judicial review to quash the decision of the licensing justices for the City of London in respect of an application to declare final a provisional licence under the Licensing Act 1964.

R. v. City of London Licensing Justices, ex parte Mecca Leisure Limited Q.B.D. 193

LOCAL AUTHORITIES

Appeals - meaning of "person aggrieved" - London County Council (General Powers Act) 1947.

A local authority within the Greater London area refused to renew a street trader's licence. The street trader appealed to the magistrates' court, which allowed the appeal. The local authority then appealed to the Crown Court, which allowed the appeal and reinstated the initial refusal. The street trader applied for judicial review of the Crown Court's decision, but at the hearing of this application a preliminary point arose as to whether or not the Crown Court had had jurisdiction to hear the local authority's appeal,and this in turn depended on whether the local authority was a "person deeming himself aggrieved" by the decision of the magistrates'

court, within the meaning of s. 64 of the London County Council (General Powers) Act 1947. Dealing with the preliminary point only, the Queen's Bench Divisional Court:

Held (quashing the decision of the Crown Court): (1) As a result of the decision of a Divisional Court in *R.* v. *London Quarter Sessions, ex parte Westminster Corporation* (1951) 115 J.P. 350; [1951] 2 K.B. 508, which was a decision directly on the present section, and which had been followed in a number of other cases, the Court was bound to hold that the local authority was not "a person aggrieved" by the decision of the magistrates' court; and (2) it was unfortunate but irrelevant that the local authority would have had a right of appeal against the decision of the magistrates' court if the case had arisen outside the Greater London area, when the relevant provision would have been para. 6(6) of sch. 4 to the Local Government (Miscellaneous Provisions) Act 1982.

Application for judicial review of a decision of the Crown Court sitting at Southwark.

R. v. Southwark Crown Court, ex parte Watts Q.B.D. 666

MAGISTRATES

Application to withdraw consent to summary trial and elect trial by jury - condition precedent to justices' unfettered discretion.

The applicant was charged with two offences of indecent assault on a young girl. Following his arrest he had asked for the services of a duty solicitor who was present when he was interviewed the next day. He was then remanded on bail. At the adjourned hearing both the duty solicitor and the prosecution indicated that summary trial was appropriate, and, having been put to his election by the court clerk, the applicant consented to be dealt with by the magistrates' court. He pleaded not guilty and a date was set down for the hearing. Thereafter the applicant became dissatisfied with the services of the duty solicitor and consulted another solicitor who applied to the justices to re-elect for trial by jury. The basis of his application was that the applicant had not been properly advised by the duty solicitor as to the merits of trial by jury. The justices took the view that there was no reason to think that the applicant did not understand the nature and significance of the choice he had made for summary trial and in the exercise of their discretion they refused the application. On application for judicial review:

Held: In considering an application by a defendant to re-elect for trial by jury the justices had to determine whether or not he understood the nature and significance of the choice he had made to be tried summarily. If he did then the justices had an unfettered discretion whether or not to grant the application. In the instant case the justices were entitled to find that the applicant did so understand and they were not obliged to investigate the reasons for that choice or the quality of the advice he had received from the duty solicitor.

Application: for judicial review of a decision of the Bourne justices refusing an application by Ivan Donald Cope to withdraw his consent to summary trial and re-elect for trial by jury.

R. v. Bourne Justices, ex parte Cope Q.B.D. 161

Bail - whether conditions can be imposed on grant of bail in relation to non-imprisonable offence.

Arising out of a disturbance at a fox-hunting meet, the three applicants appeared before the Bournemouth magistrates' court on September 16, 1987, charged with an offence under s. 5 of the Public Order Act 1986 (not punishable by imprisonment) and with behaving in a manner

likely to cause a breach of the peace. They were released on bail on condition that they did not attend another hunt meeting before their next appearance. On November 7, Cross was arrested for breach of that condition of his bail and was remanded in custody on November 9 but released on unconditional bail by the Crown Court the following day.

When all three applicants appeared before the Blandford magistrates' court on November 26, Cross and Griffin were granted bail on condition that they did not disrupt any hunt prior to their trials fixed for February 1, 1988. Pamment, however, indicated that in certain circumstances he would intervene to prevent a hunt being carried on illegally and this was taken by the justices as a refusal to agree to the imposition of that condition and he was remanded in custody. He later agreed to be bound by that condition and was released on bail. On application by the three applicants for judicial review and a claim for damages by Cross and Pamment in respect of their remands in custody.

Held: 1. Justices were entitled to impose conditions on the grant of bail in cases where the alleged offence was not punishable by imprisonment. Sections 3(3)(c) and 3(6) of the Bail Act 1976 restricted conditions which could be applied in *all* cases where bail was granted, and although para. 8 of Part I of sch. 1 to the Act was expressly limited to cases involving imprisonable offences, its absence from Part II of the schedule was of no significance in cases involving non-imprisonable offences.

In the present case the justices were empowered by s. 3 to impose the condition which they did impose since they were clearly of the view that it was necessary to secure that the applicants did not commit an offence on bail. Moreover the remand in custody of Cross on November 9 was effected properly in pursuance of s. 7 of the Act.

2. There was no power to withhold bail except on the grounds prescribed in Part I of sch. 1 in relation to imprisonable offences and in Part II in relation to non-imprisonable offences. Accordingly, in the present case the order of November 26 remanding Pamment in custody was unlawful and would be quashed. The condition of bail could have been imposed on him and any later indication that he would attend a hunt could have been dealt with under s. 7. In those circumstances, having regard to the alternative way in which the matter could have been dealt with, it was for Pamment and his advisers to consider whether to pursue his claim for damages.

Application: for judicial review of the decisions of Bournemouth justices and Blandford justices relating to the grant of bail with conditions in a case involving a non-imprisonable offence.

R. v. Bournemouth Magistrates' Court, ex parte Cross, Griffin and Pamment Q.B.D. 440

Breach of partly suspended sentence - committal to Crown Court under wrong statutory provision - power to commit for sentence for offences under s. 56 of Criminal Justice Act 1967.

The appellant pleaded guilty at the magistrates' court to offences of reckless driving and using a motor vehicle without insurance. Both offences were committed during the period of a partly suspended sentence of imprisonment imposed at the Crown Court on a charge of rape. On June 23, 1988, after several adjournments, the justices committed the appellant to the Crown Court to be dealt with under s. 24(2) of the Powers of Criminal Courts Act 1973 and further committed him for sentence in respect of the two motor offences under s. 56 of the Criminal Justice Act 1967.

At the Crown Court the appellant was sentenced to nine months' imprisonment and disqualified for 12 months for the reckless driving and conditionally discharged for the insurance offence. The Crown Court also restored nine months of the partly suspended prison sentence imposed for rape to be served concurrently. On appeal against sentence:

Held:

1. The power of a magistrates' court to commit an offender to the Crown Court to be dealt with in respect of a breach of a partly suspended sentence was under para. 2(2) of sch. 9 to the Criminal Law Act 1977 and not s. 24(2) of the Powers of Criminal Courts Act 1973 which related only to wholly suspended sentences. Accordingly the justices had erred in committing the appellant under the latter section, but as the error was simply one of form and the appellant had suffered no detriment, the decision of the Crown Court in respect of the partly suspended sentence was valid. Having regard to all the circumstances, however, the sentence of imprisonment would be reduced from nine months to six months.

2. Section 56 of the Criminal Justice Act 1967 (as then enacted) did not empower the justices to commit the appellant to the Crown Court to be dealt with in respect of the two motoring offences. At the time of the committal the definition of "relevant offence" in s. 56(1) did not include rape (being triable on indictment only) nor did the section apply to a committal for a breach of a partly suspended sentence under sch. 9 to the Criminal Law Act 1977. Although the committal under s. 56 was therefore invalid, the Court of Appeal had no power to quash it. Only a Queen's Bench Divisional Court was empowered to do that.

R. v. Leicester City Magistrates, ex parte Dennison

The Lord Chief Justice: We waive any procedural requirements. We grant leave and grant the order for judicial review.

Any further proceedings which may be embarked upon before the justices, must be instituted at the earliest possible moment for reasons which have become apparent during the judgment given by McCullough, J.

R. v. Dennison; R. v. Leicester City Magistrates, ex parte Dennison Q.B.D. 56

Committal proceedings - grievous bodily harm with intent - finding of no prima facie case - no consideration given to alternative lesser charges - procedure where decision on lesser charges sought.

In committal proceedings against the applicant on a charge of grievous bodily harm with intent contrary to s. 18 of the Offences Against the Person Act 1861, his solicitor indicated a plea of self-defence and at the conclusion of the prosecution case called the applicant and two witnesses to give evidence. Following submissions by the defence and prosecution solicitors, the examining justice retired and, having consulted the clerk in her room, returned to court and announced that she found no *prima facie* case.

The applicant's solicitor thought that the proceedings were over, but the clerk indicated that the justice had not considered the alternative charges under s. 20 and s. 47 of that Act. He asked both solicitors whether they had any submissions to make on these lesser charges which he proposed to invite the justice to consider. The applicant's solicitor repeated his earlier submission on self-defence. The justice retired again and after consulting the clerk, returned to court and committed the applicant for trial for an offence under s. 47.

On application for judicial review it was submitted (a) that the justice was *functus officio* when she committed the applicant for trial and (b) that the procedure adopted was grossly unfair and a breach of natural justice.

Held:

1. At the conclusion of the evidence the only question put to the justice and considered by her on the first retirement was whether there was a *prima facie* case under s. 18 of the Act alone. In those circumstances the justice was not *functus officio* in respect of the alternative lesser charges which she had not considered.

2. The procedure adopted in the present case was most undesirable and most unfortunate and ought never again to be followed. On the issue of a breach of natural justice, however, the court took the view that, wrong though the procedure had been, no real injustice had been

done to the applicant and there was no undue influence exerted by the clerk in relation to the committal for trial.

Accordingly the application would be refused.

Per Watkins, L.J.:

"Quite clearly what should have happened here, if the rules of procedure and practice had been conformed to, was that before the justice retired on the first occasion, the clerk should have canvassed with the Crown prosecutor and [the defence solicitor] the possibility of the justice considering not only committing under s. 18 but in the alternative under s. 20 or s. 47. If that had been done, as would have been perfectly proper in the circumstances in open court, then both advocates would have had a similar opportunity, at the right moment, to fully address the justice upon whether it would have been appropriate at all for her to consider the alternative charges, or either one of them."

Application: for judicial review of a decision of the Gloucester magistrates' court committing the applicant Keung Chung for trial.

R. v. Gloucester Magistrates' Court, ex parte Chung Q.B.D. 75

Committal to Crown Court for sentence - misunderstanding by stipendiary magistrate of gravity of offences when accepting jurisdiction - whether committal valid.

At a hearing before a stipendiary magistrate to determine the mode of trial under s. 19 of the Magistrates' Courts Act 1980, the prosecutor outlined all the relevant factors including the facts that the 10 charges against the applicant were specimen charges only, that further offences forms had to be prepared and that the total amount involved in the case was in the region of £50,000. In those circumstances the prosecutor invited the magistrate to order a Crown Court trial. After hearing representations by the defence in favour of a summary trial, the magistrate agreed to accept jurisdiction in the case, and the applicant consented to summary trial and pleaded guilty to the 10 charges. At an adjourned hearing, when the prosecutor had outlined the case, the magistrate indicated that at the mode of trial inquiry he had not appreciated that the 10 charges were specimens and he had been under the impression that the total amount involved was £15,000, and that he now considered that his sentencing powers were insufficient to deal with the case. At a further adjourned hearing, having heard legal argument from both sides, the magistrate concluded that he had power to commit for sentence under s. 38 of the 1980 Act and decided to exercise that power.

Held: Where at a mode of trial inquiry under s. 19 of the Magistrates' Courts Act 1980 a stipendiary magistrate accepted jurisdiction to deal with the case summarily having misunderstood the material facts of the case which were fully outlined to him, he was not entitled at a later stage (the defendant having consented to summary trial and pleaded guilty) to commit the defendant to the Crown Court for sentence on appreciating the true gravity of the offences.

This was not a case where there had not been a proper inquiry and as no new additional material relevant to the decision to commit for sentence had emerged subsequently in the course of the proceedings, the committal for sentence would be set aside and the case remitted to the magistrates' court for sentence.

Application: by Hugh Morgan for judicial review of a decision of Cardiff stipendiary magistrate committing him to the Crown Court for sentence.

R. v. Cardiff Stipendiary Magistrate, ex parte Morgan Q.B.D. 446

Committal to prison for non-payment of fine - decision quashed by Divisional Court - liability of justices for costs on grounds of misconduct.

On February 25, 1986, the applicant was convicted and ordered to pay fines and compensation totalling £1,310 on two charges of obtaining credit whilst an undischarged bankrupt. At a means inquiry on June 23, 1986, the justices made an order of committal to prison suspended on terms that he paid £10 weekly. Nothing was paid and at a further inquiry on February 6, 1987, the applicant who was represented by the duty solicitor, gave evidence that he had neither capital nor income, that he was not entitled to state benefit and that he was medically unfit for work. He was asked for the name of his doctor which he did not know and was unable to explain why an advertisement in respect of his business appeared in a trade directory. He explained that he was well-dressed because he was being supported by his ex-wife who insisted that he appeared at court tidily dressed. Supporting evidence was given by a probation assistant. The justices refused a request to adjourn the inquiry so that his medical condition could be explored and committed him to prison for 60 days.

Having refused an application by the applicant to state a case on the ground that it was frivolous, the justices were later directed to do so by an order of *mandamus.* Subsequently an application to the Divisional Court for an order to remit the case to the justices for amendment of the statement of evidence therein was refused, but the justices were asked to make available at the hearing of the appeal the original contemporaneous note of the means inquiry which the chairman of the bench had deposed he had made. The clerk to the justices later deposed that the chairman's note could not be found but he submitted a summary of the reasons for the committal and a statement of his and his assistant's recollections of the hearing on February 6, 1987.

Following an adjournment of the substantive appeal by way of case stated, leave was granted for the applicant to move for judicial review and this was combined with a claim for damages by the applicant for false imprisonment on the ground that the justices had no jurisdiction to commit him to prison.

Held: 1. The order of the justices committing the applicant to prison would be quashed and a direction given that the matter should continue as if started by writ and that the damages be assessed by a Master.

2. On the question as to whether the justices should be ordered to pay the applicant's costs, the Court would be guided by the principles set out in *R.* v. *Willesden Justices, ex parte Utley* [1948] 1 K.B. 397 and *R.* v. *Liverpool Justices, ex parte Roberts* (1960) 124 J.P. 336; [1960] 2 All E.R. 384, wherein it was decided respectively:

(i) that costs would only be awarded against justices in the rarest of circumstances when they have done something which calls for strong disapproval; and
(ii) that it was the practice not to grant costs against justices merely because they have made a mistake in law, but only if they have acted perversely or with some disregard for the elementary principles which every court ought to obey, and even then only if it was a flagrant instance.

Applying those principles, the justices would be ordered to pay the applicant's costs on the following grounds:

(a) the justices were not justified in refusing to state a case on the ground that the application ws frivolous because clearly it was not, since, on the evidence, they could not reasonably have concluded that the applicant's failure to pay was due to his wilful refusal or culpable neglect;
(b) the case stated had substantially to be altered upon representations of the applicant's solicitor;
(c) the disappearance of the chairman's note was surprising, to say the least;
(d) the reasons for the committal as set out in the justices' clerk's summary were not wholly reflected in the case as subsequently stated;

(e) the matter was treated without the seriousness which it demanded and justice was neither done nor seen to be done;
(f) there were indeed flagrant breaches by the justices of proper conduct.

Application: for judicial review of a decision of York City justices committing Peter Farmery to prison for non-payment of fines and compensation.

R. v. York City Justices, ex parte Farmery Q.B.D. 257

Community service order against defendant under 21 years - breach proceedings after attaining that age - powers of court to pass custodial sentence under s. 16(3)(a) of the Powers of Criminal Courts Act 1973.

On February 18, 1986, the defendant, then aged 20 years, having been convicted of offences of failing to supply a specimen of breath for analysis and taking a motor vehicle without the owner's consent, was placed on a community service order for each offence. He failed to comply with those orders and admitted various breaches in proceedings under s. 16 of the Powers of Criminal Courts Act 1973 after he had attained the age of 21. Under s. 16(3)(a) of that Act the justices revoked the community service orders and sentenced him to concurrent terms of six weeks' imprisonment, taking the view that as he was then over 21 they were precluded by s. 4 of the Criminal Justice Act 1982 from ordering his detention under that section. On application for judicial review:

Held: Section 16(3)(a) of the Powers of Criminal Courts Act 1973 authorized a magistrates' court on proof of a breach of a community service order to "deal with the offender for the offence in respect of which the order was made in any manner *in which he could have been dealt with* for that offence by the court which made the order if the order had not been made". Those words required the court dealing with the breach to look at the position as it was when the community service order was made. In the present case, therefore, the justices should have treated the applicant as if he was still under 21.

Accordingly the sentences of imprisonment were unlawful by virtue of s. 1(1) of the Criminal Justice Act 1982 and would be quashed.

Application: for judicial review of sentences of imprisonment passed by Wyre magistrates' court on Michael Boardman for breaches of community service orders made when he was under 21.

R. v. Wyre Magistrates' Court, ex parte Boardman Q.B.D. 206

Compensation order - defendant's inability to pay within reasonable time - incorrect to order payment over an indefinite period.

The appellant pleaded guilty to six counts of obtaining social security benefit by deception and was sentenced to a community service order on each count and ordered to pay £100 costs. In addition a compensation order was made for £3,347.74 being the total amount of overpayment made to him on the basis of his false statements. When making that order the Recorder said "He obviously cannot pay it back within a year nobody expects him to. The DHSS needs that order in case of some future event" - which meant in case of future employment or means.

Held: It was wrong in principle for a compensation order to be made on the basis that it would run for an indefinite time and only in effect be enforced as and when it could be shown that the defendant had come into funds which would enable him to pay it.

In the circumstances of the present case the amount of the compensation order would be reduced to £500 payable at about £10 weekly.

Appeal: by Steven Diggles against a compensation order made by the Nottingham Crown Court.

R. v. Diggles C.A. (Crim. Div.) 14

Consent to summary trial - subsequent application to change to election for trial - procedure.

The applicant was charged with going equipped for theft and, following disclosure of the prosecution evidence, he consented to summary trial and pleaded not guilty. At an adjourned hearing before different justices he was legally represented and his solicitor asked that the applicant be permitted to re-elect as to the mode of trial on the ground that when he had consented to summary trial he had not understood the consequences thereof. No evidence was given to the justices as to what happened at the earlier hearing nor was the applicant invited to give evidence to explain his misunderstanding. After hearing submissions, the justices refused the application.

Held: A defendant who sought to re-elect on the basis that he did not understand what he was doing when he elected the mode of trial, had to establish that fact to the satisfaction of the justices. He could do that by adducing evidence and/or giving evidence himself of his lack of comprehension. Moreover, before the justices consider their decision, they need to know what happened on the earlier occasion when the election was made. If the same justices were sitting on both occasions they might have that information by remembrance. However, if (as in the present case) the justices dealing with the application to re-elect did not sit on the earlier occasion, they must receive evidence as to what then occurred, and that evidence was best provided by the court clerk who was then present.

The decision of the justices would be set aside and the case remitted to them to hear the necessary evidence before exercising their discretion.

Application: by Michael Andrew Spicer for judicial review of a decision of the Forest magistrates' court refusing his application to re-elect as to the mode of trial.

R. v. Forest Magistrates' Court, ex parte Spicer Q.B.D. 81

Enforcement of fines - means inquiry warrant - whether constable not in possession of warrant is entitled to arrest defaulter - Magistrates' Courts Act 1980, ss. 125(3) and 125(4).

Justices dismissed charges against three defendants based on informations each of which depended upon the question whether a police constable was acting in the execution of his duty when he purported to arrest one of the defendants against whom a means inquiry warrant had been issued under s. 83(1)(b) of the Magistrates' Courts Act 1980. At the time of the purported arrest the officer knew that a warrant was in existence, but did not have it in his possession, nor did he know the amount outstanding. When another defendant challenged the right of the officer to arrest the defaulter when not in possession of the warrant, it was alleged that the offences set out in the informations were committed.

Held: 1. A warrant under s. 83(1)(b) of the Magistrates' Courts Act 1980 for non-payment of a fine was not issued "in connexion with an offence" for the purposes of s. 125(4)(a) of that Act.

2. Although s. 83(3) of the 1980 Act provided that a means inquiry warrant could be executed in like manner to a s. 13 warrant (which was clearly a warrant "to arrest a person in connexion with an offence"), that did not import into s. 83(3) the connexion with an offence for the purposes of s. 125(4)(a). That conclusion was based on:

(a) the absence of an express reference to s. 83 in s. 125 of the Act;
(b) the circuity of the route by which it was sought to apply s. 125(4)(a); and
(c) the need for clear words to undo a provision of the common law.

Section 83(3) was confined in its application to matters concerning the execution of warrants outside England and Wales.

Accordingly the constable seeking to execute the warrant issued under s. 83(1)(b) was not entitled to the benefit of s.125(3) exempting him from the requirement of having the warrant in his possession at the time.

Appeal: by the prosecution by way of case stated against a decision of the Darlington justices dismissing informations against the respondents.

R. v. Peacock and Others Q.B.D. 199

Indictment - conditions necessary for indicting defendant on charges not committed for trial but based on evidence before the examining justices - proviso to s. 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933.

The appellant was charged at the Crown Court on two indictments - the first in relation to a number of counterfeiting offences on which he had been committed for trial, and the second in relation to four bankruptcy offences in respect of which there was ample evidence before the committing justice but no charge and no committal for trial. The prosecution were unable to include the bankruptcy counts in the first indictment because of r. 9 of the Indictment Rules 1971.

Following the conviction of the appellant on the first indictment, his counsel moved to quash the second indictment on the ground that it did not comply with the provisions of s. 2(2) of the Administration of Justice (Miscellaneous Provisions) Act 1933. The assistant recorder ruled against the application whereupon the appellant pleaded guilty to the bankrupcty offences. On appeal against conviction on the second indictment:

Held: Since, under s. 2(2) of the 1933 Act, no bill of indictment was preferred and the appellant was not committed for trial on the bankruptcy charges, the question turned on whether the proviso to that section permitted the new charges to be contained in a separate indictment.

The position was that charges in respect of which a defendant has not been committed for trial, even though based on evidence before the examining justices (who committed him for trial on other charges), could only be the proper subject of indictment if the following two conditions were satisfied:

1. the charges must be in substitution for or in addition to counts in respect of which he was committed for trial, and
2. the new counts could lawfully be joined in the same indictment as that containing the charges on which he was committed for trial.

Those conditions were not satisfied in the present case.

The appeal would be allowed and the convictions on the bankruptcy charges quashed.

Appeal: by Raymond Lombardi against his conviction at Southwark Crown Court of four bankruptcy offences.

Information - summary offence - to be laid within six months - computer link between police and court - whether information fed into computer link within time but not printed out at court until after time limit was laid in time.

By s. 127 of the Magistrates' Courts Act 1980 an information for an offence which is triable summarily only must be laid within six months of the alleged offence. The defendants were alleged to have committed such an offence on December 6, 1986. There was a computer link between Pontypridd police station and the magistrates' court. The practice for laying an information was for the police to feed the information into the system which transmitted it to the court. Informations against the defendants were fed into the system by the police on Friday June 5, 1987, which was within the time limit. The input was not printed out at the magistrates' court until Monday June 8, 1987, which was outside the time limit. When the matter came before a stipendiary magistrate on November 23, 1987 he held that the informations had been laid within time.

The defendants applied for judicial review, seeking an order of prohibition restraining the stipendiary magistrate or any other magistrate from proceeding to further hear or adjudicate upon the informations.

Held: An information was laid when it was received at the office of the justices' clerk. It was not necessary for it to be personally received by a magistrate or the justices' clerk. It was enough that it was received by a member of staff expressly or impliedly authorized to receive it for onward transmission to a magistrate or the justices' clerk. See *Hill* v. *Anderton* (1982) 146 J.P. 348. If the information had been received in a letter on the Friday (within time) which was not opened until Monday (out of time) s. 127 of the 1980 Act would have been satisfied. There was no distinction between that situation and feeding the information into a computer link. The application would be refused.

Application for judicial review of a decision of Mr. Ben Oliver, stipendiary magistrate for the county of Mid-Glamorgan.

Kerb crawling - "likely to cause nuisance to other persons in the neighbourhood" - whether justices entitled to use their knowledge of the area.

The appellant was convicted of kerb-crawling on an information which alleged that he solicited a woman for the purpose of prostitution from a motor vehicle in such a manner or in such circumstances as to be likely to cause a nuisance to other persons in the neighbourhood, contrary to s. 1 of the Sexual Offences Act 1985. The evidence before the justices was that the appellant stopped his vehicle near a known prostitute, had a short conversation with her and she then got into the vehicle. There was no evidence that anyone had actually been caused nuisance. The justices, however, took into account their local knowledge, particularly that the area was often frequented by prostitutes with a constant procession of cars driving around it at night and that it was a heavily populated residential area.

Held (dismissing the appeal): In proceedings for kerb-crawling under s. 1 of the Sexual Offences Act 1985 justices were entitled to take into account matters within their local knowledge in deciding whether or not the circumstances were such as to be likely to cause a nuisance to other persons in the neighbourhood. It was not necessary to call evidence that a specific member of the public was in fact caused nuisance - it was sufficient if there was a likelihood of nuisance being caused.

Appeal: by way of case stated by the Luton justices in respect of their conviction of John Patrick Paul of an offence under s. 1 of the Sexual Offences Act 1985.

Paul v. Luton Justices, ex parte Crown Prosecution Service Q.B.D. 512

Pleas of guilty and not guilty respectively to two offences arising out of a single incident - whether magistrate refusing to hear not guilty plea and dismissing case acting without jurisdiction.

The defendant pleaded guilty to exceeding the speed limit and not guilty to driving without due care and attention. Both offences arose out of a single incident but were not dependent on the same facts. When the magistrate suggested that no evidence should be offered on the not guilty plea, prosecuting counsel said he was instructed to proceed but would endeavour to take instructions over the telephone. His attempt to telephone, however, was not successful and when he reported this to the court the magistrate refused to hear the summons of driving without due care and attention and dismissed the case. There was no hearing of the evidence nor an intimation of the facts on which the prosecution relied.

Held: The magistrate in refusing to hear the evidence and dismissing the summons was in breach of s. 9(2) of the Magistrates' Courts Act 1980 and acted without jurisdiction. His decision would be quashed and a declaration made as requested that the dismissal of the summons was a nullity.

Per Lord Justice Stocker:

"It is most desirable that before magistrates in busy London stipendiary courts decide to dismiss an information or summons they should at least know from the prosecution what the facts are upon which the summons is to be supported. It is also desirable that [prosecuting] counsel should be in a position to exercise their discretion as counsel rather than have to refer a matter of this sort for authority to do so."

Application: by the Crown Prosecution Service for judicial review of a decision of Wells Street stipendiary magistrate dismissing an information against Paresh Shah.

R. v. Wells Street Stipendiary Magistrate, ex parte Crown Prosecution Service Q.B.D. 421

Procedure - nature of reasonable excuse for refusing to supply sample of breath under s. 8(7) of the Road Traffic Act 1972 - whether arrested person entitled (a) to await solicitor's advice or (b) to have reasonable time to read Code of Practice under Police and Criminal Evidence Act 1984.

The two cases raised similar issues regarding the nature of reasonable excuse for refusing to give a sample of breath under s. 8(7) of the Road Traffic Act 1972 and were heard together.

Director of Public Prosecutions v. Skinner

The defendant was arrested at 11.55 p.m. having failed a roadside breathalyzer test and at the police station to which she was taken, she asked for the duty solicitor and for a telephone call to be made. A police officer made the telephone call on her behalf. At 12.28 a.m. she was asked and agreed to provide two specimens of breath. She then repeated her request to make a telephone call and when she was told it had been made she said she wanted to check this and

added that she wanted to make the call herself. She was told three or four times that there was a limited time for providing the breath and that she could telephone after the procedure had been completed. At 12.30 a.m. she was told that she had failed to provide a specimen of breath and was charged with the offence under s. 8(7) of the 1972 Act. The duty solicitor subsequently telephoned the police at 1.20 a.m.

The stipendiary magistrate was of opinion following *Smith* v. *Hand* [1986] R.T.R. 265 that there was no case to answer as the defendant had not refused to provide a specimen and he dismissed the charge. On appeal by the prosecution

Held (allowing the appeal): The decision in *Smith* v. *Hand (supra)* should be understood as applying only in cases in which the defendant had been told positively that he could wait for his solicitor. Such a situation might be capable of giving rise to a reasonable excuse. That was not the position in the present case, which was indistinguishable from *Director of Public Prosecutions* v. *Bilington* (1988) 152 J.P. 1; [1988] R.T.R. 231, where it was held that the right of an arrested person to consult a solicitor now provided in s. 58 of the Police and Criminal Evidence Act 1984 did not furnish him with a reasonable excuse for not providing a specimen when requested.

Director of Public Prosecutions v. Cornell

The defendant, having failed a roadside breathalyzer test, was arrested and taken to the police station where he arrived at 1.20 a.m. There he asked for and was allowed to read Code C of the Codes of Practice made under the Police and Criminal Evidence Act 1984 but was refused permission to read those sections of the Road Traffic Act relevant to his case. He was offered but declined the services of a solicitor and was told that the testing procedure could not be unduly delayed. At 1.35 a.m. he was required to provide two specimens of breath but he replied that he would not do so until he had read the Code of Practice and all the relevant pages of the Road Traffic Act pertaining to excess alcohol. Before the defendant had completed his reading of the Code the police officer made three further requests for him to provide the specimens of breath required but he declined until he had completed his perusal of the Code. Thereafter at 1.45 a.m. he was told that he would be charged with refusing to supply a specimen and was so charged.

The stipendiary magistrate was of opinion that the defendant should have been given a reasonable time to read the Code of Practice before being asked to provide the specimen and found that as his perusal of the Code occupied no more than 10 minutes, it was not unduly protracted and he dismissed the information. On appeal by the prosecution:

Held (allowing the appeal): The position of an arrested person in respect of the requirement to provide a specimen of breath under s. 8(7) of the Road Traffic Act 1972 was no more favourable in relation to perusal of the Code of Practice than in relation to access to a solicitor under the Police and Criminal Evidence Act 1984. The principles set out in the decision of *R.* v. *Billington (supra)* applied to the reading of the Code of Practice as they did to requesting access to a solicitor.

Appeals: by the prosecution by way of cases stated against the dismissal of informations by magistrates charging Jaquiline Skinner and Charles Edward Jason Cornell with an offence under s. 8(7) of the Road Traffic Act 1972.

Prosecution supplying inadequate advance information - whether justices entitled to find prosecution amounted to abuse of process of court.

In proceedings against the defendant for an offence of criminal damage triable either way the prosecutor at first refused to furnish advance information under r. 4 of the Magistrates' Courts (Advance Information) Rules 1985 on the ground that disclosure would result in further damage and intimidation of himself and his witnesses, relying on r. 5 of the Rules. At an adjourned hearing, however, he undertook to provide such information and subsequently furnished a limited summary but declined to provide any further details, again relying on r. 5. The justices found that the summary was inadequate and concluded that the prosecutor's conduct amounted to an abuse of the process of the court. Accordingly they dismissed the case and ordered him to pay £100 defence costs. On appeal by case stated:

Held: Where a prosecutor failed to furnish the defence with adequate advance information pursuant to r. 4 of the Magistrates' Courts (Advance Information) Rules 1985, it was not open to the justices, on the basis of those Rules alone, to hold that the conduct of the prosecution amounted to an abuse of the process of the court and dismiss the case. The proper course was for justices, in accordance with r. 7 of the Rules, either to adjourn the proceedings pending compliance with the requirement to provide advance information or to proceed to hear the information if satisfied that the defendant would not be substantially prejudiced by reason of the non-compliance.

Although under the general law justices did have power to refuse to hear an information based on abuse of the process of the court, in the circumstances of the present case the prosecution did not amount to such an abuse within the parameters stated in *R.* v. *Derby Crown Court, ex parte Brooks* (1984) 148 J.P. 609; [1984] 80 Cr. App. R. 164.

Accordingly the appeal would be allowed and the case remitted to the justices to give an opportunity to the prosecutor to enlarge upon his summary under r. 4.

Appeal: by James Murray King by way of case stated against the decision of the Ealing justices dismissing his information against Zdzislaw Franciszek Kucharz for criminal damage.

King v. Kucharz Q.B.D. 336

Refusal of application by prosecutor for adjournment to enable his witnesses to attend trial - breach of rules of natural justice.

On May 9, 1988, the defendant appeared before the magistrates' court charged with theft committed in November 1986. No indication had been given whether the defendant would contest the charge or, if she did, whether she would elect for trial on indictment or consent to summary trial. No prosecution witnesses were present at the hearing. Having agreed to be tried summarily the defendant at first pleaded guilty but then, having taken advice on the suggestion of the justices, she changed her plea and the prosecutor applied for an adjournment to enable his witnesses to attend. The application was refused and the justices dismissed the case.

Held: It was a breach of the rules of natural justice for justices to refuse an application by the prosecutor for an adjournment to enable his witnesses to attend the trial in circumstances where through no fault of their own the prosecution were unable to present their case.

An order of *certiorari* would be granted to quash the decision of the justices but in view of the time lapse they would not be ordered to proceed with the hearing.

Application: by the prosecution for judicial review of a decision of the Enfield magistrates' court dismissing a charge of theft against Joyce Grace Ashcroft.

R. v. Enfield Magistrates' Court, ex parte Director of Public Prosecutions Q.B.D.415

Request for clerk to retire with justices must be made in open court - whether court entitled to investigate reasons for changing plea from not guilty to guilty - allegation that justices improperly influenced by their clerk.

The applicant was involved in a serious offence of burglary with two other men who elected trial by jury and were sentenced to three and four years' imprisonment. The applicant escaped but was later arrested and at the mode of trial inquiry the justices rejected the prosecution's request for Crown Court hearing and the applicant consented to summary trial and pleaded not guilty. When the case came on for hearing before a differently constituted bench, the clerk to the justices (having been advised in advance that the applicant intended to change his plea) refused a request by counsel to put the charge again and drew attention to the power of the court under s. 25 of the Magistrates' Courts Act 1980, to the sentences passed on the co-accused and suggested that there were features of the case which might make the plea equivocal. He asked whether the applicant would be prepared to give evidence as to why he had changed his plea but did not press this when counsel objected. The bench retired with the clerk (though neither the prosecution nor the defence advocates heard the justices' request for him to do so) and thereafter the charge was put and the applicant pleaded guilty. The justices were then informed of the applicant's long criminal record and following mitigation they retired again, this time openly asking the clerk to accompany them, and on their return committed the applicant to the Crown Court for sentence under s. 38 of the 1980 Act. On each of the two retirements which lasted for 30 and 35 minutes respectively, the clerk was with the justices for all but five minutes.

On application for an order of *certiorari* to quash the committal and an order of *mandamus* requiring the justices to pass sentence themselves:

Held: 1. Whenever justices retiring to consider a matter requested their clerk to accompany them to give advice, they should make their request clearly and in open court.

2. When a defendant who had pleaded not guilty to an offence indicated that he wished to change his plea to guilty, the only question to be determined by the court was whether the proposed plea was equivocal. If, as in the present case, the plea was not equivocal, the justices had no option but to accept the plea and it was wholly improper for the court to seek to investigate the defendant's motives and reasons for his change of plea and the advice he had received. The clerk's suggestion that the applicant should give evidence as to his reason for change of plea was a serious misunderstanding of the position.

3. Following *R.* v. *Liverpool City Justices, ex parte Topping* (1983) 76 Cr. App. R. 170, the approach of the court was whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the applicant was not possible. The facts of the present case gave rise to a reasonable suspicion that the clerk was endeavouring to influence the justices and the order of committal would be quashed. The justices, however, had power to commit for sentence under s. 38 of the Magistrates' Courts Act 1980 and the application for *mandamus* would be refused. The case would be remitted to another bench of the justices to consider whether they should commit for sentence or deal with the matter themselves.

Application: for judicial review of a decision of the Eccles justices committing the applicant James Francis Fitzpatrick to the Crown Court for sentence on a charge of burglary.

R. v. Eccles Justices, ex parte Fitzpatrick Q.B.D. 470

Sentence - juvenile charged with serious offence - magistrates accepting summary trial - committing for sentence after plea of guilty - Crown Court imposing three years' detention under s. 53(2) of the Children and Young Persons Act 1933 - sentence appropriate but invalid.

By s. 24(1) of the Magistrates' Courts Act 1980, where a juvenile is brought before a magistrates' court charged with an indictable offence other than homicide, he shall be tried summarily unless he has attained the age of 14, the offence is one mentioned in s. 53(2) of the Children and Young Persons Act 1933, and the court considers that it should be possible to sentence him in pursuance of s. 53(2) of the 1933 Act. Section 53(2) of the 1933 Act provides that where a juvenile is convicted on indictment of any offence punishable in the case of an adult with imprisonment for 14 years or more, the court may sentence him to be detained for such period, not exceeding the maximum term of imprisonment with which the offence is punishable in the case of an adult, as may be specified in the sentence.

By s. 37 of the 1980 Act a magistrates' court may commit a juvenile aged not less than 15 for sentence by the Crown Court if of opinion that he should be sentenced to a greater term of youth custody than it has power to impose. By s. 7(1) and (8) of the Criminal Justice Act 1982 the maximum term of youth custody (including consecutive sentences) is 12 months.

A juvenile appeared before a magistrates' court charged with an offence of assault with intent to rob (which carries life imprisonment) and four offences of burglary (which carries 14 years' imprisonment). The magistrates decided he should be tried summarily. The defendant pleaded guilty. The magistrates committed him for sentence at the Crown Court under s. 37 of the 1980 Act. The Judge imposed three years' detention under s. 53(2) of the 1933 Act for the offence of assault to rob and two years' detention (concurrent) for each of the offences of burglary.

The juvenile appealed.

Held - allowing the appeal: Although the offence of assault with intent to rob richly deserved the sentence of three years' detention, that sentence was not available to the Crown Court because the defendant had not been convicted on indictment. As he had been convicted in a magistrates' court and committed for sentence, the maximum sentence possible was 12 months' youth custody. The sentence of three years' youth custody would, therefore, be quashed and a sentence of 12 months' youth custody substituted.

Per curiam: In a case where 12 months' youth custody may not be an adequate sentence the prosecutor should not invite magistrates to deal with the offence summarily. Further, the magistrates themselves should be vigilant not to do so.

R. v. Learmonth C.A. 18

Substitution of charges depriving defendant of right to jury trial - whether abuse of process of the court.

The applicant was arrested and charged with an offence triable either way, namely, attempted theft of property from a motor vehicle. At an adjourned hearing the prosecutor applied to the stipendiary magistrate for leave to withdraw that charge and substitute an oral information for the summary offence of interfering with a motor vehicle contrary to s. 9 of the Criminal Attempts Act 1981. It was accepted by the prosecutor that the reason for the application was to deprive the applicant of his right of trial by jury on the original charge. After hearing argument during which no submission was made that the preferment of the alternative charge was in any way inappropriate, the stipendiary magistrate granted the application. On application for judicial review:

Held: In the absence of bad faith on the part of the prosecutor or of unfairness or prejudice to the accused, the prosecutor's motive in substituting one charge for another was irrelevant, even if the purpose of the substitution was to deprive the accused of his right to jury trial on the original charge. In the present case the stipendiary magistrate's decision was open to judicial review on the ground of abuse of the process of the court only if the substitution was so wholly inappropriate to the gravity of the applicant's conduct that no magistrate properly

directing himself could have reached it. That was not the position in the instant case. The application would be dismissed.

Application: by Joseph Patrick Ellison for judicial review of a decision of the City of Liverpool stipendiary magistrate relating to the substitution of charges.

R. v. City of Liverpool Stipendiary Magistrate, ex parte Ellison Q.B.D. 433

Summary trial - defendant having denied offence in police interview fails to attend hearing - whether justices entitled to dismiss case on basis of reasonable doubt.

The defendant was charged with contravention of a one-way street traffic order. On July 7, 1987 his car was seen being driven in the wrong direction in a one-way street in St. Albans and its registration number was reported to the police. When interviewed by a police officer a month later, the defendant said he was the owner of the car but did not know whether he was in St. Albans on the relevant date. He admitted he knew the street in question was one-way but specifically denied the offence.

The defendant did not appear at the court hearing and the prosecution adduced in evidence under s. 9 of the Criminal Justice Act 1967 statements made by the eye-witness and the police officer together with a note of the interview. The justices concluded that there was a reasonable doubt in the prosecution case and dismissed the information.

Held: The justices were not entitled to place reliance upon a denial of the offence by the absent defendant which was in flat contradiction of the positive evidence adduced by the prosecution that a clear offence had been committed by him. They ought to have adjourned the case and notified the defendant of his right to attend the adjourned hearing, plead not guilty and give evidence on his own behalf. At the adjourned hearing the justices should hear the oral evidence of the prosecution witnesses and the evidence, if any, tendered by the defendant, and decide the case on that basis.

Case remitted for re-hearing before a different bench.

Appeal: by way of case stated by the St. Albans justices against their dismissal of an information against an absent defendant.

Director of Public Prosecutions v. Gokceli Q.B.D. 109

Whether an information must be laid by a named person.

The appellant was charged on an information laid by "Thames Valley Police" with exceeding the 70 m.p.h. speed limit on a motorway. He raised a preliminary point that the information was invalid in that it did not disclose the identity of the informant. When the justices ruled against that submission the appellant pleaded guilty to the offence and was fined £90, disqualified for 30 days and his licence was endorsed. On appeal by case stated:

Held (dismissing the appeal): The single issue in the appeal was whether an information has inevitably to be laid by a named person such as, in the case of a police prosecution, the chief constable himself or some other authorized member of his force. In the present case the informant "Thames Valley Police" could only be identified as either (a) the body of constables known as the Thames Valley Constabulary or (b) an unknown constable within that body.

As to (a) Parliament could not have intended the extended meaning of "person" in sch. 1 to the Interpretation Act 1978 (to include a body of persons corporate or unincorporated) to

apply to the laying of informations. Rule 4(1) of the Magistrates' Courts Rules 1981 militated strongly against any other view.

As to (b) although the identity of the actual informant was masked by the title "Thames Valley Police", no-one could have been in doubt that it was a police officer who had laid the information and his identity could easily have been ascertained.

A chief constable had an undoubted right to lay an information no matter who was the actual informant from within his force and that right could be delegated by him to any of his officers. An accused was entitled to know the identity of the person who accused him of an offence and that person must have authority to lay an information. But where, as in the present case, an erroneous title was given in an information to a person who had a right to prosecute and no one was misled as to the status of that person, that error did not render that information invalid.

Per Watkins, L.J.: "I would ... advise that no matter what sophisticated aids are used for laying informations, care should be taken to ensure that modern technology be not allowed to cause departure from what should be, and I feel sure is, customary police practice, which is to lay informations by a named person."

Appeal: by case stated from a decision of the Maidenhead justices whereby Howard Jeffrey Rubin was convicted of an offence of exceeding the speed limit.

Rubin v. Director of Public Prosecutions Q.B.D. 389

POLICE

Assault on police - constable's power of entry and arrest without warrant - no specific finding that constable had reasonable suspicion of arrestable offence having been committed - whether entry and search lawful - Police and Criminal Evidence Act 1984, s. 17.

The appellant was convicted of assaulting a police constable in the execution of his duty. The facts found by the justices were that the constable, having received information by radio from another officer that he had been assaulted by six youths who ran away, went to a block of flats with other officers to search for the youths. He saw a youth suspected of involvement in the assault enter the block and he went to the flat which he was told the youth had entered. The appellant came to the door and the constable told him "One of my fellow officers has just been assaulted by six youths and they have run off and I believe one of the youths ran in here. May I come in and have a look?" When the appellant refused to admit the constable until he had a warrant, the constable told him he had a power of entry without a warrant and attempted to enter the flat. A struggle ensued, in the course of which the appellant assaulted the constable and was arrested. A search of the flat for the youth proved abortive.

On a submission of no case to answer, the justices accepted that the only legal ground for the constable to enter the flat was for the purpose of arresting a person for an arrestable offence but they found no evidence of the gravity of the original assault by the six youths. They decided, however, that the evidence reasonably disclosed an offence of violent disorder within s. 2 of the Public Order Act 1986 (which is an arrestable offence). Accordingly they overruled the submission and, after hearing the defence evidence, convicted the appellant. On appeal by case stated:

Held: The police constable was entitled to arrest the youth without a warrant if he had reasonable grounds for suspecting

1. that an arrestable offence had been committed and
2. that the youth was guilty of that offence.

If, but only if, those conditions were satisfied and the constable had reasonable grounds for believing that the youth was in the appellant's flat, was he entitled to enter and search the flat for the purpose of arresting that youth. It was clearly implicit in the statutory provisions that the constable must not only have reasonable grounds for suspecting or believing, but must in fact do so.

Although the constable knew that a common assault on the first officer had been committed, the justices expressly and deliberately refused to draw any inference as to the nature and seriousness of the assault, or the gravity of the injury or harm, if any, sustained by the first officer, so as to bring the assault within the definition of an arrestable offence. Moreover, the justices did not find as a fact that the constable reasonably suspected that an offence under s. 2 of the Public Order Act 1986 or any other arrestable offences had been committed or any facts amounting to an arrestable offence had occurred. The evidence adduced plainly did not enable them to identify any arrestable offence which the police constable suspected.

In allowing the appeal the court was not holding that the police constable did not have reasonable grounds to suspect that an arrestable offence had been committed, but the conviction could not stand in the absence of a finding that he did.

Appeal: by way of case stated against the conviction of Arthur Chapman by the Inner London justices on a charge of assaulting a police constable in the execution of his duty.

Chapman v. Director of Public Prosecutions Q.B.D. 27

PRACTICE NOTE

Judicial review - time for filing affidavit in reply - R.S.C. Ord. 3, r. 5, and Ord. 53, r. 6, as amended by R.S.C. (Amendment) 1989.

With effect from March 7, 1989 and by virtue of r. 7 of R.S.C. (Amendment) 1989 (S.I. 1989, 177), the period allowed to a respondent in judicial review proceedings for filing an affidavit in reply under R.S.C. Ord. 53, r. 6(4) will be increased from 21 days to 56 days.

This follows a general acceptance that the period of 21 days was unrealistically short and therefore, in many cases, unenforceable. The period substituted cannot be so characterized. It has been set realistically, having regard to the interests of both applicants and respondents, and as such must be strictly adhered to. Although there is provision for extending this period (see Ord. 3, r. 5) it must be clearly understood that extensions of time will be granted only in circumstances which are wholly exceptional and for the most compelling reasons. For all practical purposes respondents would be well advised to treat the period of 56 days as absolute.

Thus in any case in which the notice of motion and other documents referred to in Ord. 53, r. 6(1) are served upon a respondent on or after March 7, that respondent has 56 days in which to file in the Crown Office any affidavit in reply.

The Crown Office will not accept respondents' affidavits outside the 56 day period unless an extension of time has first been obtained.

Applications for extension of time will be considered in the first instance by the Master of the Crown Office. An appeal against his decision will lie to a Judge hearing cases in the Crown Office List.

Where a Judge directs an expedited hearing by entering a case in Part D of the Crown Office List (see the Lord Chief Justice's Practice Direction *(Practice Note* [1987] 1 All E.R. 368; [1987] 1 W.L.R. 232) applicants should have in mind the need to invite the Judge to abridge the 56 day period where the circumstances of the case so require.

Delays in lodging respondents' affidavits have hitherto caused severe prejudice to applicants and consequent damage to the administration of justice. The amendment to Ord. 53, r. 6(4), and the procedure set out in this Practice Note, will prevent the continuance of this difficulty.

Watkins, L.J.
Deputy Chief Justice

PRIVATE HIRE VEHICLE LICENSING

Exemption for vehicles used under a contract for hire for not less than seven days - s. 75(1)(b), Local Government (Miscellaneous Provisions) Act 1976, and s. 101, Magistrates' Courts Act 1980.

Section 75(1)(b) of the Local Government (Miscellaneous Provisions) Act 1976, which contains an exemption from the general licensing scheme for private hire vehicles where the vehicle is used 'under a contract for ... hire ... for a period of not less than seven days', is an exemption provision within the scope of s. 101 of the Magistrates' Courts Act 1980, with the result that it falls to the defendant to establish that such a contract exists. Furthermore, the exemption is not established where a contract may be terminated at any time without notice, even though, as a matter of fact, the contract has actually been effective for more than seven days.

Appeal by way of case stated against a decision of the justices for West Yorkshire sitting as a magistrates' court at Leeds.

Powers of the court when dealing with appeals against conditions controlling the display of identification discs or plates - Part II, Local Government (Miscellaneous Provisions) Act 1976.

Where the local authority have issued a private hire care licence under Part II of the Local Government (Miscellaneous Provisions) Act 1976, subject to a condition prescribing the manner in which an identification disc or plate shall be displayed, and there is an appeal to the magistrates' court against the condition:

(a) the size and design of the disc or plate cannot be the subject of the appeal;
(b) the only exemptions from displaying a disc or plate are those contained in s. 75 of the 1976 Act, and therefore whilst the court can vary a condition, the court cannot (i) allow such an exemption, or (ii) delete a condition without replacing it with another condition;
(c) the nature of the business conducted by the proprietor of the hire car is irrelevant to the appeal.

Appeal by way of case stated against a decision of the Crown Court sitting at Warwick (Mr. Recorder Alexander, Q.C. and justices).

Scope of defence under s. 75, Local Government (Miscellaneous Provisions) Act 1976.

Where a vehicle is used without a licence in circumstances which *prima facie* amount to an offence under s. 46 of the Local Government (Miscellaneous Provisions) Act 1976, a defence under s. 75 of that Act, namely that the vehicle was used under a contract for hire for a period

of not less than seven days, will succeed only if the vehicle in question is specifically identified in the contract, or, perhaps, if the terms of the contract permit the provision of a substitute vehicle.

Appeal by way of case stated against a decision of the justices for the City of Coventry.

PUBLIC HEALTH

Statutory nuisances - whether an adverse finding is a 'conviction' and a nuisance order is a 'sentence' - s. 94, Public Health Act 1936 and s. 28, Legal Aid Act 1974.

Statutory nuisance proceedings are criminal in character, therefore (a) a finding that a statutory nuisance exists is a conviction; (b) an order requiring the abatement of a statutory nuisance is a sentence; and therefore, more particularly, (c) where an individual has obtained a nuisance order against a local authority on application to the magistrates' court under s. 99 of the Public Health Act 1936, and the local authority appeals to the Crown Court, legal aid may be available to the individual under s. 28(5) of the Legal Aid Act 1974, for the purposes of resisting the appeal.

Application for judicial review of a decision of the Inner London Crown Court.

RATING AND VALUATION

Submission of no case to answer in proceedings requiring a respondent to show cause why he has not paid the rate - whether there is a discretion as to putting the respondent to his election as to whether he will call evidence if the submission is unsuccessful - s. 97, General Rate Act 1967.

In proceedings under s. 97(1) of the General Rate Act 1967, requiring a respondent to appear and show cause why he has not paid the rate, the magistrates have an unfettered discretion as to whether, before agreeing to entertain a submission of no case to answer, they put the respondent to his election as to whether he will call evidence in the event of the submission being unsuccessful.

Appeal by way of case stated against a decision of a stipendiary magistrate sitting at Horseferry Road, London.

Whether distress warrants must be executed promptly - whether failure to give a ratepayer a 'notice of distress and inventory' renders the distress illegal - the correct relationship between the Statute of Marlborough 1267 and the General Rate Act 1967.

1) A local authority which has obtained a distress warrant in respect of unpaid rates is

under no obligation to execute the warrant promptly, and accordingly it does not lose the right to do so by reason of delay.

2) Failure to give a ratepayer a 'notice of distress and inventory', in accordance with art. 8 of the Distress for Rates Order 1979, is an 'irregularity in the execution of the warrant' for the purposes of s. 99(7) of the General Rate Act 1967, but it does not render the distress illegal, and therefore the ratepayer can recover damages only if he sustains special damage as a result of the failure.

3) The intention of Parliament is that the provisions of the Statute of Marlborough 1267, dealing with limitations on levying distress and on the places to which distress may be taken, should be subject to the provisions of the General Rate Act 1967, and therefore those limitations do not apply in the case of distress for unpaid rates.

Appeal against a decision of Mrs. Assistant Recorder Hoggett sitting in the West London county court.

RESIDENTIAL CARE HOMES

Decision-making process when considering applications to cancel registration - s. 11, Registered Homes Act 1984.

When a justice of the peace is considering whether to make an order, under s. 11 of the Registered Homes Act 1984, cancelling the registration of a person in respect of a residential care home, (a) the correct test is not simply "is there a serious risk to the life, health or well-being of the residents?", but "will there be a serious risk if no order is made?" and therefore the future plans of the registered person are a material consideration in the decision-making process; but (b) the Code of Practice for Residential Care, which is principally relevant in relation to ss. 9 and 10 of the Act, is of little relevance in the decision-making process under s. 11.

Appeal against a decision of a Registered Homes Tribunal.

[**Note:** the case of *Lyons and Lyons* v. *East Sussex County Council,* referred to in the judgment, is reported at (1988) 152 J.P. 488; 152 L.G. Rev. 674.]

ROAD TRAFFIC

Breathalyser - failing to provide specimen - specimen required on basis that in charge - not open to court to find that defendant had driven and sentence accordingly - s. 8(7), Road Traffic Act 1972, as substituted.

In the course of an investigation, the appellant was required to provide two specimens of breath on the basis that he had been in charge of a motor vehicle. The appellant was convicted of failing to provide such a specimen without reasonable excuse. The justices concluded from the evidence that the appellant had been driving or attempting to drive and sentenced accordingly and in particular considered that the appellant was subject to a compulsory disqualification.

Held: (1) That where the investigation officer did not specify the offence which he was investigating, the purpose would be a question of fact for resolution by the justices. Where a particular offence was specified, there was no room for dispute. The specimens were required for the offence of being in charge and the punishment must be that prescribed for that offence and disqualification was discretionary.

(2) Applying *R.* v. *Courtie* (1984) 148 J.P. 502; [1984] A.C. 463, that where, as in this case, a statute provided that the punishment differed depending on the circumstances, Parliament had created two distinct offences. This difficulty ought to be overcome by making the charge plain or by charging in the alternative.

Appeal by Raymond Stuart Gardner by way of case stated against a decision of the Portsmouth justices that he on September 15, 1987, being required by a constable in the course of an investigation into an offence under ss. 5 or 6 of the Road Traffic Act 1972, to provide two specimens of breath for analysis, failed without reasonable excuse to provide such specimens, contrary to s. 8(7) of the Road Traffic Act 1972, as amended by the Transport Act 1981.

Remitted to the justices to determine in their discretion whether to disqualify.

Raymond Stuart Gardner v. Director of Public Prosecutions Q.B.D. 357

Breathalyser - in charge whilst unfit through drink - in charge with excess alcohol - comparison between the two offences and the defence of no likelihood of driving applicable to each - whether expert evidence necessary of loss of alcohol in the body during the relevant period - Road Traffic Act 1972, ss. 5 and 6, as substituted.

On December 2, 1987, the respondent was acquitted of the offences of being in charge of a motor vehicle on a road whilst unfit to drive through drink or drugs and being similarly in charge after consuming so much alcohol that the proportion of it in his breath exceeded the prescribed limit, contrary to ss. 5(2) and 6(2) respectively of the Road Traffic Act 1972, as substituted.

The acquittal for the in charge whilst unfit offences was by the defence in s. 5(3) under which a person is deemed not to have been in charge of the motor vehicle if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as he remained unfit through drink or drugs.

The acquittal for the in charge with excess alcohol offence was under s. 6(2) whereby it is a defence for a person charged with such an offence to prove that at the time he was alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath remained likely to exceed the prescribed limit.

The respondent had been to a party with his girlfriend. They had made arrangements to stay the night. Feeling unwell, the respondent had gone outside at about 3 a.m. and then sat in the driver's seat of his parked car where he fell asleep. His keys were in the ignition. Here he was found by the police and the usual procedures were followed. The lower of the two breath readings provided by him at 3.51 a.m. was 97 microgrammes of alcohol per 100 millilitres of breath. He was charged with the two offences at 4.30 a.m. and shortly afterwards allowed to leave the police station.

His intention had been to drive himself and his girlfriend to work the following morning leaving at about 9 a.m. The justices, without hearing expert evidence on the rates of alcohol destruction by the body, were of the opinion that the statutory defences applied.

Held: (1) dismissing the appeal against acquittal on the s. 5(2) charge that the question depended on the defendant's unfitness to drive at the relevant time and this was a matter which laymen could decide without always having expert assistance; but

(2) directing a conviction on the s. 6 charge and applying *Pugsley* v. *Hunter* [1973] R.T.R.

285 and other cases, because it was not a case which was plain without expert assistance and the defence was not clearly established.

Appeal by the Director of Public Prosecutions by way of case stated from the decision of the Enfield justices sitting at Tottenham.

Director of Public Prosecutions v. Frost Q.B.D. 405

Breathalyser - intoximeter reading - lower specimen of breath 43 microgrammes - replaced by blood sample - whether introduction of breath specimen readings in evidence invalidated proceedings - s. 6(1), Road Traffic Act 1972, as substituted.

The appellant was convicted by the Newport justices on March 10, 1988, of driving a motor vehicle, having consumed alcohol in such a quantity that the amount in his body as ascertained from analysis of a specimen provided by him, exceeded the permitted limit in that it showed him to have 97 milligrammes of alcohol in 100 millilitres of blood.

Following an investigation, the appellant provided two breath specimens with readings of 42 and 43 microgrammes of alcohol per 100 millilitres of breath respectively on the Intoximeter device. As entitled he required the lower breath specimen to be replaced by a specimen of blood or urine as required by the constable. A blood specimen was required and taken providing a reading of 97 milligrammes of alcohol per 100 millilitres of blood.

The justices found that the appellant had tampered with the blood sample given to him by injecting alcohol-free blood thus reducing the alcohol level on this sample to 74 milligrammes of alcohol per 100 millilitres of blood.

It was contended on behalf of the appellant that the justices should not have admitted evidence of what the breath specimen readings were because this evidence was prohibited by s. 8(6) of the 1972 Act and because the admission was prejudicial. It was conceded that the fact of the taking of the readings was admissible.

Held: That the magistrate had not relied on the breath specimen readings in reaching their decision and they did not therefore err in admitting the defence.

Per Curiam, they might have erred if they had taken into account the breath specimen reading as part of the evidence of the excess alcohol in the blood.

Appeal: by the appellant, Paul Albert Yhnell, by way of case stated against his conviction before the Newport, Gwent, justices.

Paul Albert Yhnell v. Director of Public Prosecutions Q.B.D. 364

Driving whilst disqualified - defence of necessity or duress of circumstances.

The appellant was convicted of driving on a road a motor vehicle whilst disqualified for holding or obtaining a licence contrary to s. 99 of the Road Traffic Act 1972, as amended.

The Judge held that the offence of driving whilst disqualified was an absolute offence and that the appellant was not entitled to put forward matters which amounted to a defence of necessity.

The appellant's wife had suicidal tendencies. On a number of occasions before the day in question, she had attempted to take her own life. On the day in question, her son, the appellant's stepson overslept to the extent that he was bound to be late for work and at risk of losing his job unless the appellant drove him there. The appellant's wife was distraught and more particularly it was said that she was threatening suicide unless the appellant complied. There was medical evidence in support. As the Judge held that the appellant was not entitled to put forward this defence, the appellant was convicted.

Held (allowing the appeal and quashing the conviction) applying *R.* v. *Conway* (1988) 152 J.P. 649 that first English law did in extreme circumstances recognize a defence of necessity. Most commonly this defence arose as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it could arise from other objective dangers threatening the accused or others. Arising thus it was called "duress of circumstances".

Secondly, the defence was available only if, from an objective standpoint, the accused could be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.

Thirdly, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or might he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, might a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions were yes, then the jury would acquit.

The Judge should accordingly have permitted the appellant to raise the defence before the jury.

Appeal by Colin Martin against his conviction at Snaresbrook Crown Court on February 2, 1988 for driving whilst disqualified contrary to s. 99 of the Road Traffic Act 1972.

R. v. Colin Martin C.A. (Crim. Div.) 231

Excess alcohol - blood sample - subtraction to allow margin for error - whether fraction of milligramme should be ignored - s. 6(1) Road Traffic Act 1972, as substituted.

On April 11, 1988, the appellant was driving his motor car on the A64 when he was stopped, breathalyzed and arrested and the usual procedure was followed culminating in the appellant giving a blood sample. The part kept by the police was analyzed and four results obtained, averaging 88.2 mg. The part kept by the appellant was also analyzed and six results obtained, averaging 86.2.

The prosecution standard practice was to round down by six, also ignoring any fraction of a milligramme. The resulting prosecution reading was therefore 82 mg. On the same basis the result obtained by the appellant's analyst was 80 mg.

The appellant contended that as his analyst had produced a reading of 80 mg, he should be given the benefit of the doubt and acquitted. The justice found that the appellant did have in excess of 80 mg of alcohol in 100 ml of blood and convicted.

Held: The justices were entitled to reach this finding and that they were not bound to deal with the case on the basis of rounding down the defence analyst's figures after the decimal point.

Appeal: by the appellant, Robert John Oswald, by way of case stated against the conviction by the Bulmer East, North Yorkshire justices.

Robert John Oswald v. Director of Public Prosecutions Q.B.D. 590

Failing to report accident - unaware of accident at time of accident - becoming aware within 24 hour period - failing to report - whether offence committed - Road Traffic Act 1972, s. 25(2).

The justices dismissed an information against the respondent, Craig Steven Drury, that he, being the driver of a motor car, owing to the presence of which on Little Maplestead Road, an accident having occurred whereby damage was caused to another vehicle, and not having given his name and address to a person having reasonable ground for so requiring, failed to report the accident as soon as was reasonably practicable, and in any case within 24 hours.

The respondent had been driving his car with a passenger. There was music playing in the car. Neither he nor his passenger was aware of the minor collision with another car in a narrow country lane, although they appreciated that the cars had passed very close. On arrival at their destination, 15 minutes later, both the respondent and his passenger noticed a small rubber mark on the driver's side. They both assumed that there must have been a minor collision. The respondent did not report the accident.

Held: That a driver who was not aware of an accident at the time it occurred, but subsequently became aware of it, had a duty to report the accident in accordance with s. 25(2) of the 1972 Act provided that he became so aware within 24 hours.

Remitted to the justices with a direction to convict.

Hackney carriage licence - appeal to magistrates' court - procedure - by way of rehearing.

The respondent applied to the appellant council for a hackney carriage licence pursuant to s. 59(1) of the Local Government (Miscellaneous Provisions) Act 1976. That subsection provided that the licence could not be granted unless the council was satisfied that the applicant was a fit and proper person to hold a licence. The application was refused and the reasons for refusal were set out in a letter from the appellant council. The respondent appealed to the magistrates' court. Under s. 300 of the Public Health Act 1936, the appeal was by way of complaint.

At the hearing of the appeal, the appellant sought to adduce evidence of further matters which it was claimed the council had originally considered in reaching its decision. The magistrates declined to accept the evidence and decided that the application should be confined to the grounds specified in the refusal. They heard the appeal and allowed it.

Held, applying *Sagnata Investments Ltd.* v. *Norwich Corporation* [1971] 2 Q.B. 614, that the proceedings should have been by conducting a complete rehearing.

Remitted to the justices for the application to be reheard by a differently constituted bench.

Sentence - death by reckless driving - length of imprisonment - length of disqualification - s. 1 of the Road Traffic Act 1972.

The appellant was convicted on June 15, 1988, after a seven day trial at Isleworth Crown Court of causing death by reckless driving, contrary to s. 1 of the Road Traffic Act 1972. He was sentenced to 30 months' imprisonment and disqualified for seven years. He appealed against sentence to the Court of Criminal Appeal.

After drinking, the appellant drove his Range Rover at 3 a.m. along the M4. The vehicle had been specially adapted and was more powerful than the standard. There was evidence of excessive speed. The appellant's vehicle swayed across the road and had struck the vehicle in front, killing the occupant. The appellant had run away from the scene. The result from a blood test taken four hours after the accident showed a figure of 130 milligrammes of alcohol per 100

millilitres of blood. This was translated backwards to give a figure of approximately 200 milligrammes per 100 millilitres, or two and a half times the permitted level.

It was argued on his behalf that the penalty was excessive having regard to the fact that he had no previous convictions, that he had not been racing or anything similar, and the consequences of imprisonment to him personally and to his business. It was also argued that his plea of not guilty was not a case of a man who told lies but was simply to rely on expert evidence obtained for him.

Held: That the aggravating factors were, most significantly, the greatly excessive quantity of alcohol, the fact that he made off after the accident, and the long course of driving. The discount for a plea of guilty was not the converse of a penalty for the manner in which a defendant conducted his defence but a discount which acknowledged the defendant's contrition. Whether the defendant gave evidence or not did not touch on his entitlement to the discount. In a case as flagrant as this, there could have been little discount for a plea of guilty.

Appeal against the sentence imposed at Isleworth Crown Court of 30 months' imprisonment and seven years' disqualification dismissed.

R. v. Melvin Harrington-Griffin C.A. (Crim. Div.) 274

Sentence - death by reckless driving - two counts - length of imprisonment - length of disqualification.

The appellant pleaded guilty at Leeds Crown Court on April 29, 1988, to two charges of causing death by reckless driving contrary to s. 1, Road Traffic Act 1972.

He was sentenced to concurrent terms of four years' imprisonment and was disqualified from driving for 10 years. He appealed against sentence to the Court of Criminal Appeal.

After drinking, the appellant had driven on a mad journey and had collided with a Reliant three wheeler motor car. As a result of the accident, two of the passengers in the other car died. The appellant had run away from the scene. The result from the Intoximeter 3000 machine was that the lower of the two readings was 66 microgrammes of alcohol in 100 millilitres of breath.

It was argued on his behalf that the penalty was too close to the maximum of five years' imprisonment having regard to the facts that the offences were not the worst of their type and that the appellant had pleaded guilty. He had expressed remorse and there was a possibility that his drink had been 'spiked'.

Held: Considering *R.* v. *Boswell* (1984) 6 Cr. App. R. (S) 257 and *R.* v. *Janes* (1985) 7 Cr. App. R. (S) 170, the appellant had an appalling record and the courts would punish such a man severely. However an inordinate period of disqualification could but lead to further trouble. Looking at the guidance to be found in other cases, the period would be reduced.

Appeal against sentences imposed at Leeds Crown Court (His Honour Judge Coles): appeals against concurrent sentences of four years' imprisonment dismissed, but the period of disqualification reduced from seven years to four years.

R. v. Bennett (Paul) C.A. (Crim. Div.) 317

Speeding - need for corroboration - whether corroboration required for accident investigation evidence based on marks on the road and on the vehicle and on tests - ss. 89(1) and (2) of the Road Traffic Regulation Act 1984.

Section 89(2) requires there to be corroboration of evidence of excess speed in the opinion

of one witness. On March 20, 1987, the appellant collided with a pedestrian. The appellant was convicted after one witness only had given evidence as to her speed. The witness was an expert on traffic reconstruction. His evidence was that her speed was not less than 41 m.p.h. It was based on marks on the road and on the vehicle and on tests and calculations.

Held (dismissing the appeal): That although the witness's evidence included a significant element of expert opinion, there was more than mere opinion evidence as to speed. It included the objectively determined phenomena on which his expert opinion was based.

Appeal: by way of case stated against a decision of C.R. Seymour, Esq., sitting as an acting stipendiary magistrate at Tower Bridge magistrates' court.

Crossland v. Director of Public Prosecutions Q.B.D. 63

SHOPS

Sunday trading - whether premises used as a travel agency are a 'shop' within the definition of that term contained in s. 74 of the Shops Act 1950.

A business providing services is a "retail business" for the purposes of the Shops Act 1950 only if the services are in some way connected with goods, and therefore premises from which a travel agent's business is conducted are not within the definition of "shop" for the purposes of the Act.

Appeal: against a decision of the Crown Court sitting at Derby, allowing an appeal against convictions imposed by Ilkeston magistrates' court on informations alleging unlawful Sunday trading.

Erewash Borough Council v. Ilkeston Co-operative Society Ltd. Q.B.D. 141

SLAUGHTERHOUSES

Admission of bled, undressed carcass to a slaughterhouse without a veterinary certificate - Slaughterhouse (Hygiene) Regulations 1977.

Regulation 19(2) of the Slaughterhouse (Hygiene) Regulations 1977 does not permit the bled, undressed, carcass of an animal, which has not died or been killed in transit, to be admitted to the slaughterhouse without being accompanied by a veterinary certificate.

Appeal by way of case stated.

East Yorkshire Borough Council v. Harrison Q.B.D. 154

TOWN AND COUNTRY PLANNING

Enforcement prosecution - meaning of 'caravan' and 'caravan site' - Caravan Sites and Control of Development Act 1960; Town and Country Planning Act 1971.

Where a planning enforcement notice refers to a breach of planning control arising from use of a 'caravan site', both 'caravan' and 'caravan site' are to be interpreted in accordance with

TRADE DESCRIPTIONS ACTS

Descriptions Act 1968 - excess toxic material in crayons - breach of regulations - whether statutory defence satisfied - s. 2(1) Consumer Protection Acts 1961 and 1971 as amended by s. 12 Consumer Safety (Amendment) Act 1986.

The respondents, large scale importers, were charged under s. 23 of the Trade Descriptions Act 1968 and s. 12(6) of the Consumer Safety (Amendment) Act 1986 with causing another person to commit offences contrary to the respective statutes. The facts were that one Stuart Bray sold goods, namely, wax crayons described as poisonless, when they actually contained excessive amounts of toxic material. The supply by Bray also constituted a breach of regulations made under the Consumer Protection Acts 1961 and 1971 (as amended). The respondents sought to rely on the statutory defence in s. 24(1) and s. 12(2) of the 1968 and 1986 Acts respectively on the basis that they had taken all reasonable precautions and exercised all due diligence to avoid the commission of the offences which were due to the act or default of another person. The justices held that the defences were made out. They found that the respondents used agents in Hong Kong whose duties included checking the quality of crayons by visiting the factory and submitting samples by a Government Analyst in Hong Kong. The respondents provided the manufacturer with the legal requirements, although the crayons were a proprietary brand and not made to the specification of the respondents. Adverse reports only were to be conveyed to the respondents who had a single packet randomly sampled from a batch of 7,000 to 10,000 packets.

The justices also found that the respondents had no reason to suspect the quality as no adverse reports had been received from their association or their agents. On appeal:

Held: That there was insufficient evidence to support the view taken by the justices. The reliance on the agents in Hong Kong was unsatisfactory, as there were no checks on whether the agents were actually testing the goods as no results were produced. In addition, selecting one packet out of 7,000 to 10,000 was a very sparse sampling exercise, and finally, no reliance could really be placed upon the lack of adverse reports by the respondents' trade association. The case would be remitted with a direction to convict on both charges.

Magnification power of telescope - statement of true scientific magnification only by supplier - no statement of maximum useful magnification which was considerably less than scientific magnification - whether statement false or misleading - ss. 1(1)(b), 2(d) and 3(2) of the Trade Descriptions Act 1968.

A customer was supplied by the appellants with an Astral 500 telescope which was stated on the box being capable of up to "455 x magnification". The evidence showed that the maximum useful magnification was 120 times, although scientifically it was correct to say that 455 times magnification could be achieved. The justices convicted the appellants. On appeal:

Held: The justices were entitled to find the offence proved as there was sufficient evidence to suggest that the statement, whilst not false, was likely to mislead the ordinary customer as to its strength, performance, behaviour or accuracy within s. 2(1)(d) and s. 3(2) of the 1968 Act.

Summer holiday brochure - whether statements fell within s. 14(1)(b) Trade Descriptions Act 1968 or were merely warranties - whether statements false to a material degree and made recklessly.

The appellants were convicted of five offences under s. 14(1)(b) of the Trade Descriptions Act 1968 concerning matters contained in their 1986 summer holiday brochure and a letter dated March 13, 1986. On p. 268 of the brochure there was a photograph of a three-masted schooner under the heading "Adriatic Islands Adventure". The brochure continued:

"The Adriatic Islands Adventure cruise offers just that - the excitement of being under full sail on board this majestic schooner."

A later version of the brochure gave details of the ship including length, width, minimum cruising speed, numbers of berths in cabins, showers and toilets and also stated:

"Your cruise will be a combination of sailing and motor sailing."

In a letter of March 13, it was stated that each boat used on the cruise carried 32 passengers approximately and had a minimum of two showers (cold water) and two toilets. Two customers booked holidays on the strength of the above statements. When they arrived for their holiday they found that the vessel provided was not the one in the photograph, was not a three-masted schooner, had no sails and only one shower. It was established that at the time of publication the appellants had only a two-masted schooner under their control. Two summonses (nos. 1 and 5) were issued in respect of the photograph, two (3 and 4) in respect of the statements in the letter, and one (no. 2) in respect of the statement concerning the combination of sailing and motor sailing. The justices convicted on all five charges.

Held: (1) As to whether the statements in the brochures and letter were ones of fact and within s. 14(1)(b), as opposed to mere warranties, it was accepted rightly by the prosecution that the statement in the later version of the brochure, which gave rise to summons no. 2, was a mere warranty and the conviction could not be upheld. As to summonses nos. 3 and 4 (number of showers) the appellants correctly conceded that they were statements of fact within the section. As to the two remaining statements (nos. 1 and 5) these were also within the section, as any ordinary person reading the words "on full sail on board this majestic schooner" alongside the photograph, could not have come to any other conclusion but that the three-masted ship depicted was already under the control of the appellants or at the very least they had the present intention to supply such a vessel. *(R. v. Sunair Holidays Ltd.* (1973) 137 J.P. 687; [1973] 2 All E.R. 1233 applied).

(2) That the statements in the summonses nos. 1 and 5 were false, the appellants having admitted the falsity of those in summonses 3 and 4. The evidence showed that at the time of publication of the brochure the only contract that the appellants had with a third party was for the charter of a two-masted schooner and the justices were justified in holding that to be sufficient evidence of falsity.

(3) That there was evidence of recklessness, notwithstanding the absence of specific evidence of recklessness on the part of somebody who might properly be called part of the directing mind of the company. If a statement is false and known to be false when originally made and nothing is done to correct it, then, subject to the defence in s. 24, the offence is proved.

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CORRECTIONS - VOLUME 153 JUSTICE OF THE PEACE REPORTS

R. v. Graham-Kerr - Page 175, line 8

The Judge summed-up in accordance with the two rulings that he had already given. We will turn to those parts of the summing-up which are relevant to the present matter. At p.18E the Judge directed the jury:

R. v. Eccles Justices, ex parte Fitzpatrick - Page 476, line 34

the final decision to commit for sentence. He submits first that it was the manifest view of the clerk that the mode of trial bench had either made an error in deciding only to offer summary trial, or else had not been informed of the full facts of the case. In my judgment, this is a reasonable inference to draw from the telephone conversations and letter of April 26, 1988, even accepting Mr. Turner's account of the telephone conversation with Mr. Hale.

R. v. Eccles Justices, ex parte Fitzpatrick - Page 477, line 23

which he had received. The suggestion by the clerk that the applicant should give evidence as to his reason for change of plea shows to my mind a serious misunderstanding of the position by the clerk. What then is the court, putting itself in the position of the fair minded observer of events, to make of the discussion between the clerk and counsel which lasted three quarters of an hour on this straightforward issue? It seems to me that it must give rise to a reasonable suspicion, to put it no higher, that the clerk was determined to see, if possible, that a change of venue should not be thwarted by the change of plea.

R. v. Eccles Justices, ex parte Fitzpatrick - Page 479, line 17

trial court was told. But I have been unable to find in the passage from Mr. Russell's affidavit which I have set out, that they did attempt this exercise.

R. v. Eccles Justices, ex parte Fitzpatrick - Page 480, line 9

in the light of our judgments, exercise their power to commit to the Crown Court for sentence, or whether they should deal with the matter themselves. It will go to different justices with a different clerk.

R. v. Da Silva - Page 639, lines 23 and 24

treated as such by the Judge. The Judge did not make it clear whether he was treating the statement as a contemporaneous one or not.

R. v. Da Silva - Page 644, line 38

sufficient that other Judges might take a different view. This experienced Judge did not misdirect himself and he performed the correct balancing exercise. In the exercise of his discretion, he permitted the evidence to be adduced. We do not think that this court should interfere with that decision. Accordingly, the appeal will be dismissed.

Loade and Ors v. Director of Public Prosecutions - Page 674, line 3

(Neill, L.J., Pill, J.)

[illegible]

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R. v. De Silva - Page 636, lines 23 and 34

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R. v. De Silva - Page 644, line 28

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Loade and Ors v. Director of Public Prosecutions - Page 674, line 3

(Neill, L.J., Pill, J.)

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and of the Inner Temple, Barrister

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SUBJECT MATTER

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IN CONTEXT

THE YORKSHIRE KIDNEY RESEARCH FUND

Charity Registration No. 501590

The Yorkshire Kidney Research Fund was established in 1970 to finance research conducted at the Regional Renal Unit at St. James's University Hospital into the problems associated with kidney failure and its treatment. The aim of the Fund is to support research into all aspects of kidney disease and, in particular, into ways of preventing kidney disease resulting in kidney failure.

The Fund also maintains two holiday homes equipped with dialysis facilities enabling patients and their families to enjoy holidays.

The Fund does not employ any paid officials, all members work voluntarily and pay their own expenses.

c/o Renal Unit
St. James's University Hospital
Leeds LS9 7TF

SCHIZOPHRENIA

It is the most important health problem afflicting the Western World; 1%-4% of the world's population are affected;

In Europe, North America and Japan about eight million people suffer from schizophrenia;

It usually begins between the ages of 15-30;

It disables people more effectively than most severe physical disabilities; yet leaves them alive for a normal life span;

It tears apart both individuals and their families, causing immense suffering;

Costs the USA over £25,000 *million* per year: it is likely that the cost in Western Europe is similar;

It therefore puts a severe strain on every economy, quite apart from the devastation caused to all those involved.

The Schizophrenia Association of Great Britain is trying to find the answer to this disease.

For information:

(a) about the research SAGB is initiating and funding and
(b) about the Association please contact:

The Schizophrenia Association of Great Britain, Bryn Hyfryd, The Crescent, Bangor. Gwynedd LL57 2AG. Tel: (0248) 354048.

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